

- I. Introduction
 - A. The regulatory taking and socially responsible property use
 - B. The social obligation in U.S. and German constitutional property law
- II. A short introduction to U.S. takings law
- III. Some basics of German constitutional property law
 - A. The social state principle
 - B. A brief history of the German constitution
 - C. Property protection in the Basic Law
 - 1. The guarantee clause
 - 2. The regulation clause
 - 3. The constitutional definition of property
 - 4. Property content regulation requiring reimbursement (*ausgleichspflichtige Inhaltsbestimmung*)
 - D. The German judicial system
- IV. The positive property guarantee in the *Grundgesetz* and the U.S. Constitution
 - A. Article 14 in the *Grundgesetz*: more than a worth guarantee
 - B. What does the U.S. Fifth Amendment guarantee?
 - 1. A guarantee of economic value?
 - 2. A purely constitutional notion of property in U.S. law
- V. Comparing the U.S. social obligation with the German *Sozialpflicht*

- A. **Germany's *Sozialpflicht***
 - 1. **The direct obligation**
 - 2. **The indirect obligation**
 - 3. **Social function or relevance of property**
 - 4. **Change of conditions**
 - 5. **Meaning for the property owner and third parties**
 - 6. **Situationally-based factors (*Situationsgebundeneheit*)**
 - B. **U.S. comparison**
 - 1. **Social relevance**
 - 2. **Meaning of property to the owner**
- IX. **Limits on the *Sozialpflicht***
- A. **Vested property rights**
 - B. **The special case of development rights (*Baufreiheit*)**
 - C. ***Kernbereich* and *Privatnützigkeit***
 - D. **What property is not: *Bestand* not *Wertgarantie***
- X. **Conclusion**

I. Introduction

Although both Germany and the United States have strong market-based economies characterized by rigorous protection of private property rights, the two countries have different conceptions of land ownership based on distinct notions of the individual's place in society. Whereas property protection under the U.S. Constitution emphasizes individual freedom, German law explicitly considers the individual's place in and relationship to the social order in defining ownership rights. Indeed, in Germany, where land is scarce and the rate of homeownership half that in the U.S.,¹ private preferences are often subordinated to a certain model of the normatively desirable community by a comprehensive and hierarchical body of land-use regulation that favors dense planning of city centers and mandates equivalent living conditions for all.

The contrast between our highly individualistic market-oriented conception of property and that of the more community-centered German social welfare state is reflected in the structure and judicial interpretation of the countries' respective constitutions.² The property clause in the German *Grundgesetz* (The Basic Law, the German constitution) contains an affirmative social obligation alongside its positive guarantee of ownership rights. This social obligation is broad in scope, only to be limited by ownership interests thought to implicate the fundamental values of human dignity and self-realization. The U.S. Constitution, on the other hand, does not explicitly recognize an affirmative social obligation of property use. At the same time, courts have not considered property a fundamental right and are reluctant to use a language of natural rights to describe ownership relations.³ Thus, in locating a limit on the social obligation of ownership, the U.S. Supreme Court has employed rhetoric emphasizing the purely

¹ Compare the national homeownership rate of 66% in the U.S. with the German rate of 33%. See U.S. Census Bureau, Housing and Household Economic Statistics Division, *Historical Census of Housing Tables*, last revised Dec. 2, 2004, at <http://www.census.gov/hhes/www/housing/census/historic/ownershipbyrace.html>; Douglas B. Diamond, Jr. and Michael J. Lea, *Housing Finance in Developed Countries: An International Comparison of Efficiency*, 3 JOURNAL OF HOUSING RESEARCH 79, 83 (1992). The average cost of land and construction in Germany is double or triple that in the United States, and the down payment on a mortgage—between 30 and 50 percent—is also much larger. See, e.g., Hyde Flippo, *Home and Home*, THE GERMAN WAY (1997).

² See, e.g., Gregory Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 739-40 (2003); Thomas J. Schoenbaum, *Planning and Land Development Law in the Federal Republic of Germany*, 54 TUL. L. REV. 624, 655-6 (1980).

³ Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850-1920*, 59 S. CAL. L. REV. 1101, 1226 (1986).

economic impact of regulation rather than its effect on a property owner's dignity or autonomy, as in Germany.

While property owners' non-economic interest may be recognized in less formalistic ways under U.S. law—consider the differential treatment of residential and commercial tenants or owner-occupancy carve-outs in just-cause eviction ordinances—economic worth plays a more significant role in our property jurisprudence than in the philosophical value-based approach of the German courts. The limit of the social obligation (as imposed by government regulation) in German law is not necessarily related to the economic impact any limitation on those rights may have, but rather measured in terms of the extent to which rights left to the property owner post-regulation serve the values or purposes for which property protection is granted by the State to individuals (dignity and self-realization). In contrast, regardless of the purposes for which property protection is granted in the U.S. (which, notably, are rarely articulated by courts), the takings clause has been interpreted in courts, in large part, as a safeguard of economic value and expectations related to realizing value in a property object.

Beginning with the assumption that both legal systems recognize a significant social obligation (in the language of German court decisions) or expansive regulatory power (in the language of U.S. courts), this note will compare how the scope of that regulatory authority is circumscribed in the respective jurisdictions by the different values protected by the respective property clauses. In depicting the German social obligation, I will pay particular attention to the positive guarantee of property rights codified in the German constitution, not only to illustrate this as a limit on the social obligation, but also to show that German courts are comfortable with highly individualized determinations into the personal meaning of property for property owners (invoking what are referred to in Anglo-American jurisprudence as personhood interests) and use such determinations to exclude purely economic interests⁴ from constitutional protection. In considering these differences between U.S. and German constitutional property regimes, I aim to address the question of what, if anything, the Fifth Amendment positively guarantees for property owners.

⁴ Purely economic interests is used here to mean the right to make a profit beyond the threshold level necessary to realize dignity and autonomy in the economic and social order.

A. The regulatory taking and socially responsible property use

The notion that there is a social obligation inherent in property ownership is not controversial in American law. Even John Locke recognized that property could not be justified as a social institution if some people were able to monopolize the ownership of goods needed by all. Although the Lockean view is often cited by property rights advocates as evidence of the fundamental primacy of property rights in the American civic and legal tradition, Locke believed that individuals should be allowed property sufficient for their needs only so long as there is sufficient land left for others.

All modern legal systems rely on institutional controls to monitor the behavior of landowners, who might not otherwise consider the negative impacts of their property use on neighboring property owners or on society in general. Usually, centralized administrative or political bodies at the federal, state or local level use public land-use controls to decide which development of private land may be carried out and which may not.⁵ This regulation of property use often aims to strike a balance between the political need for furtherance of the public welfare and stability of the legal order.⁶ The point of equilibrium reached may be thought of as the social function of property in that legal system, and how the judiciary and the legislature interact to express this function the central concern of land-use regulation.⁷

Government compensation for property physically taken from the owner by eminent domain (usually involving a transfer of title) is required by most property regimes and generally uncontroversial when awarded by a court. However, jurisdictions continue to face the question of whether and when extensive environmental or land-use regulation can constitute a “taking” or infringement of property rights that requires the government to pay compensation. The need for regulation—whether to prevent incompatible development, to conserve natural resources or to protect historic buildings—is generally recognized by a wide public. Much more contentious is the question of who should pay for measures enacted in pursuit of any given public policy

⁵ There is also a parallel decentralized private law system that exploits owners’ self-interested monitoring activity over neighboring land uses that negatively affect property values.

⁶ Ugo Mattei, *BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION* 31 (2000).

goal, particularly when a regulation has considerable financial impact on the worth or development potential of property. Assigning responsibility to the regulated owner is often perceived as unfair. Thus, distinguishing non-compensable regulation from compensable expropriation or “taking” of property often focuses on defining the scope of the legislature’s power to define property rights by regulating use and on justifying such restrictions on any given owner or use.

B. The social obligation in U.S. and German constitutional property law

In U.S. law, nuisance doctrine has traditionally been one measure for allocating the burden of socially responsible land use.⁸ A use of property that disturbs or harms other landowners may be cast as blameworthy and its source identified in visible and discrete parties or groups. However, the justification for governmental regulation of land use becomes more contentious when the use regulated cannot be characterized as a nuisance, in part because the U.S. Constitution does not contain any explicit limits on the right to use property.

Under the German constitutional property clause, Article 14, a codified social obligation (*Sozialpflicht*)⁹ has been interpreted to justify a greater range of land-use regulation than the nuisance exception that has been such a central focus of U.S. takings jurisprudence in U.S. law. As the second paragraph of Article 14, states, “Property entails obligations. Its use should also serve the public interest.” The social obligation is, both in theory and in practice, a generally-accepted and non-controversial part of German property law in comparison to the analogous notion in U.S. Supreme Court takings cases.¹⁰ Although municipalities in the U.S. have broad discretion to enact measures

⁷ *Id.*

⁸ *See, e.g., Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022 (1992) (“[M]any of our prior opinions have suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation. . . . The ‘harmful or noxious uses’ principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power.”).

⁹ Art. 14.2. Translation by AJ Van der Walt, *CONSTITUTIONAL PROPERTY CLAUSES: A COMPARATIVE ANALYSIS* 121 (1999).

¹⁰ Justice Rehnquist’s dissent in *Penn Central Transportation Co. v. New York City* is representative of perhaps the most enduring objection by plaintiffs bringing regulatory takings claims: “Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks. . . . [T]he landmark designation imposes upon [the owner] a substantial cost, with little or no offsetting benefit except for the

under the police power for a broad range of purposes—far beyond what may be characterized as a noxious or harmful use¹¹—courts are unlikely to use language that explicitly refers to the redistributive purpose of land-use regulation. The German State under the Basic Law, on the other hand, is authorized to pursue a “socially just property order” by balancing individual freedom against the interests of the general welfare and courts regularly refer to this affirmative duty of the property owner and of the State.¹² The property owner is thought to participate in the social order both by using her property—seen as an expression of freedom and a means for development of personhood—and by recognizing the social obligation as an important limit on the exercise of these rights. The State is also thought to participate in this social order by creating a property regime with the most favorable conditions for the greatest number of people to acquire property and by demanding social responsibility from property owners through land-use regulation.¹³

II. A short introduction to U.S. takings law

Direct and indirect protections of property are scattered throughout the U.S. Constitution—the Takings Clause, the Due Process Clause and the 14th Amendment, added in 1868 and interpreted to extend the Takings Clause to actions of state and local governments. For the most part, the founding fathers considered property a natural right underpinned by liberty.¹⁴ However, Takings Clause was not seen by the framers as a central feature of the Constitution or Bill of Rights.¹⁵ Of the almost two hundred constitutional amendments considered by the state ratifying conventions, none proposed a

honor of designation. The question in this case is whether the cost associated with the city of New York’s desire to preserve a limited number of ‘landmarks’ within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.” 438 U.S. 104, 138 (1978).

¹¹ See, e.g., *Lucas*, 105 U.S. at 0123 (Referring to “[t]he transition from our early focus on control of ‘noxious’ uses to our contemporary understanding of the broad realm within which government may regulate without compensation”).

¹² Manfred Weiss, *Sozialbindung und soziale Gerechtigkeit*, POLITISCHE STUDIEN, SONDERHEFT 1/2000, 23 (2000).

¹³ *Id.*

¹⁴ Robert Meltz, Dwight Merriam and Richard M. Frank, THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 13 (1999).

¹⁵ William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUMBIA LAW REVIEW 782 (1995).

takings clause.¹⁶ In fact, James Madison, author of the Bill of Rights, unilaterally included it among the amendments he proposed in 1789.

Although no Congressional debate survives about its meaning, the language eventually adopted,¹⁷ like the language of Madison's initial proposal,¹⁸ was the language of physical seizure. Thus, the Takings Clause may well have been intended to be limited in scope to government confiscation of property for public roads and buildings and other physically invasive uses.¹⁹ Few at the time imagined it would be invoked in suits by landowners against the government for actions that merely involved restriction of property use. In fact, it was not until the 1922 *Pennsylvania Coal Co. v. Mahon*²⁰ case that the Court recognized for the first time that a mere restriction by the government, in the absence of any physical occupation or appropriation of land, could trigger a Fifth Amendment right to compensation if the regulation were so restrictive as to render an owner's remaining property rights virtually useless. In *Pennsylvania Coal*,²¹ Justice Holmes reasoned that,

Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . [But] when it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.

By equating the substantial infringement of property use by regulation with the appropriation of ownership through an exercise of eminent domain, Holmes determined that there is a threshold beyond which compensation is required. However, this vision of a constitutional check on the police power to regulate property remained relatively theoretical for the next forty years. Challenges to land use regulations continued to be made on due process, not takings, grounds,²² and the Court consistently gave great deference to governmental restrictions unless they involved physical invasion or total

¹⁶ *Id.*

¹⁷ “[N]or shall private property be taken for public use, without just compensation.”

¹⁸ “No person shall be...obliged to relinquish his property, where it may be necessary for public use, without just compensation.”

¹⁹ Treanor, *supra* note 15.

²⁰ 260 U.S. 393 (1922).

²¹ *Id.*

²² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

destruction of property.²³ This deference continued throughout the Warren and Burger Court eras, as the Court declined over and over again to refine the parameters of when an excessive regulation would go too far.

Finally, in the 1978 *Penn Central Transportation Co. v. New York City*²⁴ case, the Court articulated a three-part test for determining when regulation becomes a taking. The Court identified three factors to be applied in essentially ad hoc, factual inquiries: 1) the economic impact of the regulation on the claimant; 2) the extent to which the regulation has interfered with distinct investment-backed expectations; and 3) the character of the government action.²⁵ The next year the Court articulated a different two-part rule in *Agins v. City of Tiburon*.²⁶ In this case, the Court held that a regulation goes too far if “the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.”²⁷ Some commentators have tried to make sense of these two different regulatory takings tests by arguing that the *Penn Central* test is appropriate for as-applied challenges to regulations while the *Agins* test is appropriate for facial challenges, but this distinction has not always been respected by the Court,²⁸ which has in some cases applied the *Agins* test to as-applied challenges,²⁹ and the *Penn Central* test to facial challenges.³⁰

Despite the uncertainty about when to apply which rule, the focus of regulatory takings analysis since *Penn Central* has been on the quality of the government’s actions and its impact on the landowner. The Court looks, on the one hand, at how restrictive, how important, how narrowly tailored and how valuable the State’s interests are—at, in other words, how the State justifies the regulation. At the same time, courts look to the regulation’s effects on the landowner’s ability to use, enjoy, develop, and alienate her property. This latter analysis focuses, in particular, on the economic impact on the

²³ *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

²⁴ 438 U.S. 104 (1978).

²⁵ *Id.* at 124.

²⁶ 447 U.S. 255 (1980).

²⁷ *Id.* at 260.

²⁸ See, e.g., Andrea Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CALIF. L. REV. 1299, 1316 (1989) (outlining the four takings tests used by the Court—*Penn Central*, *Agins*, the “no economically viable use” test, and the *Loretto* per se test—and concluding it is unclear which test to apply in a given case).

²⁹ See, e.g., *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

³⁰ See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987); *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. 470 (1987).

landowner and the regulation's interference with the landowner's reasonable, investment-backed expectations.

Forming the conceptual backdrop to this analysis is the bundle-of-sticks metaphor, unique to Anglo-American law.³¹ Characterizing "property" as a "bundle of sticks" or "the group of rights inhering in the citizen's relation to the physical thing,"³² the Supreme Court has recognized four essential kinds of property rights—possession, use, exclusion of others, and disposal. Although the destruction of one "strand" in the bundle is generally not considered a taking because the aggregate must be viewed in its entirety,³³ Supreme Court jurisprudence has at times emphasized one "strand" above others.³⁴

For instance, the Court's rule that permanent physical invasion of private property by the government or by something authorized by the government (e.g. residential homes destroyed by government-created floods³⁵ or apartment building owners forced to provide a place on their property for television and telephone cables³⁶) is a per se taking has been justified by the importance of the right-to-exclude "strand."³⁷ Since the right to exclude others is one of the most revered incidents of ownership in the Court's jurisprudence, there can be no greater assault on private property rights than permanent physical invasion by the government.³⁸ These cases are not addressed by the Court with a set of factors to be weighed and balanced in an ad hoc, case-by-case fashion, but rather decided on the basis of "per se" rules that focus on one particular aspect of the government's action.³⁹

Although the Due Process Clause itself is rarely cited by the Supreme Court when the issue is government restriction of a tract's economic potential, the Court's

³¹ German legal theory conceptualizes property as a unitary right as opposed to a bundle of entitlements.

³² *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (quoting *United States v. General Motors*, 323 U.S. 373, 377-78 (1945)).

³³ *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

³⁴ In *Hodel v. Irving*, for example, the Court dwelled on the right to devise.

³⁵ *Hawkins v. City of La Grande*, 315 Or. 57, 843 P.2d 400 (1992) (where sewage-laden water, released from city holding ponds onto private property, was considered a taking); *Hamblin v. City of Clearfield*, 795 P.2d 1133 (Utah 1990) (city-authorized subdivision changing drainage and flooding property may be taking).

³⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982) ([I]ntrusion of cable service onto rental property is a taking. . . .")

³⁷ Meltz, *supra* note 14 at 117.

³⁸ Meltz, *supra* note 14 at 117.

³⁹ Meltz, *supra* note 14 at 9.

announcement in 1980 in *Agins v. City of Tiburon* of a new takings criterion⁴⁰ based on the degree of fit between the government's means and ends heralded increased judicial attention to due process concerns. In fact, the subsequent *Nollan*⁴¹ and *Dolan*⁴² cases have required greater means-end scrutiny of land-use regulation than does due process analysis.⁴³ Nevertheless, this recent due process layer aside, takings law is largely focused on the economic impact or the intrusiveness of government control—on the results, rather than the means, of governmental regulation.⁴⁴ Although courts have repeatedly held that regulation foreclosing the most profitable use of property for an owner or causing a substantial reduction in a property's fair market value⁴⁵ does not alone constitute a taking,⁴⁶ the Supreme Court did suggest in dicta in the 1992 *Lucas* decision, that regulatory action that causes diminution in property values falling short of total elimination of value might be compensable under the Takings Clause.⁴⁷ Lower courts have also held that non-total reductions in market value due to government regulation may violate the Takings Clause.⁴⁸

Between 1987 and 2000 the Court appeared to be moving toward greater protection of property rights and greater scrutiny of governmental regulations. However, most recently in 2002, the *Penn Central* test was reaffirmed as the most important takings test in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.⁴⁹ Most importantly, the Court did not go further than *Lucas* had in developing what many viewed to be its extreme property-protectionist position. Nevertheless, even if a results-oriented look at takings cases suggests that other interests factor into the Court's analysis, the language employed by the Court in applying the *Penn Central* test remains focused on the economic impact of a regulation on an owner.

⁴⁰ A land use control, that case held, is a taking if it fails to "substantially advance a legitimate governmental interest." 447 U.S. 255, 260 (1980).

⁴¹ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

⁴² *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

⁴³ 483 U.S. at 834 n.3

⁴⁴ Meltz, *supra* note 14 at 132.

⁴⁵ See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (zoning measure that causes 90% reduction of property value not a taking); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1031 (3d Cir. 1987) (89% reduction not taking).

⁴⁶ See, e.g., *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

⁴⁷ *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1019-20, n.8.

⁴⁸ See, e.g., *Florida Rock Indus., Inc. v. United States*, 19 F.3d 1560 (Fed. Cir. 1994) (62% reduction in land value may be a taking); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (99% reduction in land value plus additional factors a taking); *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990) (personal property's value reduced by 54% a taking).

IV. The U.S. social obligation

Although there is much tough talk about absolute property rights in American public discourse, “the property-rights enthusiast on public radio probably does not even have the right to burn dead leaves in his own back yard.”⁵⁰ Indeed, many property owners take for granted the many limits on ownership rights recognized in U.S. law—the rights of neighbors, zoning law, environmental protection measures and other administrative rules and regulations. Zoning first passed constitutional muster in 1926,⁵¹ and since the Supreme Court began to uphold the economic and labor legislation of the Depression and New Deal period, “vigorous and direct constitutional protection of entrepreneurial property rights” has steadily declined. Courts now employ a highly deferential posture toward means as well as ends (in the rational basis test) and demand only the vaguest sense of “public purpose” in reviewing legislation and regulatory measures.⁵²

Under the well-accepted nuisance exception, land-use regulation does not violate the Fifth Amendment when “there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy”⁵³ or, put another way, “when the government is preventing or punishing wrongdoing by A.”⁵⁴ Since the owner’s use of the property is seen as the source of the social problem, “it cannot be said that he has been singled out unfairly.”⁵⁵ However, courts have applied this principle much more broadly than in traditional common-law analysis. As Justice Kennedy wrote in the *Lucas* opinion,

⁴⁹ 535 U.S. 302 (2002).

⁵⁰ Mary Ann Glendon, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 9 (1991).

⁵¹ *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926).

⁵² The public purpose requirement is being reviewed in a pending Supreme Court decision, *Kelo v. New London, Connecticut*. The Court’s public use inquiry could become more rigorous after that decision.

⁵³ *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988).

⁵⁴ Andrea Peterson, *The Takings Clause: In Search of Underlying Principles Part II -- Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CALIF. L. REV. 53, 85 (1990).

⁵⁵ 485 U.S. at 20. In his dissent in this case about San Jose’s rent-control ordinance, Scalia used this reasoning to question the validity of restrictions on rents in apartments occupied by poor tenants. He argued that because landlords who rent apartments to poor tenants are no more to blame for their poverty than “the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages,” the city should not force them to subsidize poor tenants’ housing costs.

The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source.... [N]uisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions.⁵⁶

As the scope of non-compensable land-use regulation has ballooned over time through increased judicial deference to the legislature, holding the reins of police power, there is still some discomfort in the jurisprudence about the justification for such a broad interpretation of the police power to limit property rights in land. Scalia asserts in his *Lucas* opinion that the harm-benefit rationale does not explain certain exercises of the police power since “the distinction between ‘harm-preventing’ and ‘benefit-conferring’ regulation is often in the eye of the beholder”⁵⁷ and the distinction between regulations that “prevent harmful use” and those that “confer benefit” nearly impossible to discern on an “objective, value-free basis.”⁵⁸ Joseph Sax similarly observes that takings cases based on nuisance law cannot be viewed as depending on judgments of blameworthiness but rather often represent a conflict between “perfectly innocent and independently desirable uses.”⁵⁹

Noxious-use reasoning may be difficult to apply to regulation seen to impose affirmative obligations on the property owner⁶⁰—in the case of historic preservation, for example.⁶¹ The most important case in this area is *Penn Central*, in which the landmarked plaintiff, prevented from adding additional stories in high-rent and built-up Manhattan, claimed that its property had been singled out to benefit others who bore no burdens on its behalf. Because the neighboring property owners were able to reap the economic benefits of building skyscrapers while the plaintiff, alone, had to shoulder the preservation burden, the constitutional requirement of “average reciprocity of advantage”

⁵⁶ 505 U.S. at 1035.

⁵⁷ 505 U.S. at 1024; “It is quite possible, for example, to describe in *either* fashion the ecological, economic, and esthetic concerns that inspired the South Carolina Legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from ‘harming’ South Carolina's ecological resources; or, instead, in order to achieve the ‘benefits’ of an ecological preserve.”

⁵⁸ 505 U.S. at 1026.

⁵⁹ *Takings and the Police Power*, 74 YALE L. J. 36, 49-50 (1964).

⁶⁰ As Peterson explains, the government must compensate A if it simply says, ‘We want your property because it would promote the common good.’” Peterson, *supra* note 54 at 85.

⁶¹ “Under the historic preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense.” Rehnquist, dissenting in *Penn Central*, 438 U.S. 104, 140

had not been met, the plaintiffs claimed.⁶² The Court accepted the legislature’s judgment that “the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole,”⁶³ contending that “legislation designed to promote the general welfare commonly burdens some more than others” and that the New York City law, in any case, also applied to over 400 other landmarks in the city and all the structures in the 31 historic districts. A vigorous dissent written by Justice Rehnquist, however, argued that the statute is fundamentally different than most zoning measures, which are generally justified by the fact that all property owners in a designated area are placed under the same restrictions—not just for the benefit of the municipality as a whole but also for the common benefit of one another. This reciprocity does not exist when “individual buildings . . . are singled out and treated differently than surrounding buildings.”⁶⁴ Moreover, the dissenters argued, the honor of designation, the benefits of which would “accrue to all the citizens of New York City” do not offset the multi-million dollar cost to the plaintiffs.⁶⁵

In his *Penn Central* dissent Rehnquist points out the irony in the plaintiff being “prevented from further developing its property . . . because *too good* a job was done in designing and building it.” Even Sax—a proponent of a strong social obligation—admits that there is a doctrinal contradiction. “In the ordinary case, obligation arises only because the owner has done something undesirable,” but here the plaintiff was “worse off than its neighbors,” not because anything in the proposed demolition itself or in the increased density was prohibited, but rather because it had “designed and built an especially fine building” and “now wished to withdraw the benefit that its presence had conferred.”⁶⁶ Further, Sax acknowledges, in agreement with Rehnquist, *Penn Central* “departs from the conventional view of the rights and responsibilities of owners, and

⁶² This theory, first applied in *Pennsylvania Coal Co. v. Mahon*, is based on the “equitable distribution of benefits and burdens of government action which is characteristic of zoning laws and historic-district legislation.” 260 U.S. 393, 415 (1922); 438 U.S. at 133.

⁶³ 438 U.S. at 134

⁶⁴ 438 U.S. at 140 (The *Penn Central* plaintiffs claimed that “average reciprocity of advantage” was a constitutional requirement. The mutuality of benefit and burden justifies much zoning, under this theory. Restrictions imposed on neighbors in a historic district, for example, attracts tourists and brings economic benefits to all in the district. In the same way, everyone in a zone must comply with the height or density limitations in an area in order to get their benefits of greater visibility or congestion.)

⁶⁵ 438 U.S. at 148.

⁶⁶ Sax, *supra* note 59 at 57.

acknowledges a new sort of affirmative obligation.”⁶⁷ The affirmative duty of the property owner to preserve her property at her own expense is fundamentally different from the usual negative duty (to refrain from doing harm) that has been the basis of many zoning and land-use regulation decisions. As the courts sanction this affirmative duty over and over again in historic preservation cases,⁶⁸ they countenance “the law’s dirty little secret,” Sax suggests.⁶⁹ In other words, even while the preservation obligation seems to be a generally accepted public purpose, this restriction on property use remains difficult to justify under the Supreme Court interpretation of the takings clause.

III. Some basics of German constitutional property law

A. The social state principle

In Germany, just as in the U.S., property under the Basic Law (the *Grundgesetz*) is above all a right of exclusion against others and the State,⁷⁰ as well as, in the tradition of political liberalism,⁷¹ a recognition of individual freedom.⁷² However, Article 14 must also be interpreted in the context of the German social state and the social history of the Federal Republic.

The Basic Law states explicitly that Germany is a social welfare state.⁷³ Adopted right after World War II, the German constitution arose out of a unique set of historical circumstances. The framers’ debates suggest that the political spectrum in Germany directly after the war was considerably further left than it is today:

“The capitalist economic system has not served the vital governmental and social interests of the German people well. Following the terrible political, economic and social collapse as a result of a criminal political

⁶⁷ Sax, *supra* note 59 at 58.

⁶⁸ See, e.g. Daniel T. Cavarelo, *From Penn Central to United Artists’ I & II: The Rise to Immunity of Historic Preservation Designation From Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593 (1995) (arguing that since the Penn Central decision, historic preservation designations have become immune from successful constitutional takings challenges).

⁶⁹ Sax, *supra* note 59 at 58.

⁷⁰ Walter Leisner, DENKMALGERECHTE NUTZUNG: EIN BEITRAG ZUM DENKMALBEGRIFF IM RECHT DES DENKMALSCHUTZES, 31 (2002).

⁷¹ Thomas von Danwitz, BERICHT ZUR LAGE DES EIGENTUMS 156 (2002).

⁷² Leisner, *supra* note 70 at 4-5.

⁷³ Article 20 of the Basic Law states: “The Federal Republic of Germany is a democratic and social federal state.”

power, there can only be a new order from the ground up. The content and goal of this social and economic new order can no longer be the capitalist pursuit of profit and power, but rather only the prosperity of our people.”⁷⁴

Despite its foundation in neo-classical economics, Article 14 protection may be distinguished from our liberalist tradition by the importance placed in the German constitution on community obligation. Even the broad positive right to “development of the personality” in Article 2, Paragraph 1 of the *Grundgesetz*⁷⁵ is expressly limited by its social context. In the words of the Federal Constitutional Court (the “FCC”), the court that interprets the Basic Law, “While freedom and individual dignity are fundamentally guaranteed, it cannot be overlooked that the image of man in the *Grundgesetz* is not that of an individual in arbitrary isolation but of a person in the community, to which the person is obligated in many ways.”⁷⁶ As one commentator points out, since an individual is considered to be “inextricably linked to the social order,”⁷⁷ an individual’s “use of space” must necessarily also be seen as “linked to the relationship of the individual to society.”⁷⁸

Thus, the Basic Law envisages broad public control over private property rights to reconcile a property owner’s individual right to freedom with similar rights of the individuals that make up society.⁷⁹ Land-use planning begins at the federal level and constitutes a much more comprehensive body of law⁸⁰ than our own patchwork of regulations. Under the Regional Planning Act, a federal law framing the broad outlines of land-use policy and identifying the means of implementation, state-level planning is mandatory. In contrast to the U.S., where a developer may evade the unfavorable zoning plan of a municipality by relocating her building activities just outside the city limit, the

⁷⁴ From the Ahlener Programm of the CDU (1947) (quoted in Christian Grimm, *Landwirtschaftliches Eigentum und Schutzgebietausweisungen—BRD*, Institut für Wirtschaft, Politik und Recht, Universität für Bodenkultur Wien, July 2002, at www.boku.ac.at/wpr/wprpage.html). Translation by author.

⁷⁵ “Each person has the right to free development of the personality, insofar as he does not violate the rights of others and does not violate the constitutional order or moral law.”

⁷⁶ 4 BVerfGE 7.

⁷⁷ Clifford Larsen, *What Should Be the Leading Principles of Land Use Planning? A German Perspective*, 29 VAND. J. TRANSNAT’L L. 967, 988 (1996).

⁷⁸ *Id.*

⁷⁹ Hanri Mostert, THE CONSTITUTIONAL PROTECTION AND REGULATION OF PROPERTY AND ITS INFLUENCE ON THE REFORM OF PRIVATE LAW OWNERSHIP IN SOUTH AFRICA AND GERMANY: A COMPARATIVE ANALYSIS 39 (2002).

⁸⁰ See the Regional Planning Act of 1997 (*Raumordnungsgesetz*), the Town and Country Planning Code of 1986 (*Baugesetzbuch*) and the various federal and provincial statutes on nature conservation (*Naturschutzgesetze*). See the English translations of the *Baugesetzbuch* and the *Raumordnungsgesetz* at <http://www.iuscomp.org/gla/>.

Länder (states) determines the pace and location of virtually all development, since nearly all German land lies within the territory of a municipality.⁸¹

Such an expansive and hierarchical system reflects not only the fact that Germans have many fewer acres on which to sprawl out than we do, but also the different cultural values that have developed regarding property ownership in the two nations.⁸² In contrast to the American view of land-use regulation as a means of restricting private property rights, German urban planning assumes that such government regulation is an important way of maintaining the social order. Land-use regulations have been used to promote policy objectives such as “stabilization of small cities’ populations by preventing large-scale migration for economic reasons; the prevention of sprawl and the preservation of the appearance of both cities and countryside; and the promotion of commercial agriculture and especially family farmers.”⁸³ Unlike German regulations, which “place the individual in the center of a managed landscape and a restrictive community,” American land-use regulation seems to reject this idea of a socially-situated self.⁸⁴ Late 19th century suburbanization in the U.S. marked an important change in the relationship of the individual to society with regard to residential patterns. “The new ideal was no longer to be part of a close community, but to have a self-contained unit, a private wonderland walled off from the rest of the world.”⁸⁵ Thus, as one writer argues, the normative form of the American community has become the “private, rustic life,” in which the city is not considered a necessary part of the social order and land-use controls have been “organized around a kind of flight: a flight into privacy and independence captured by the detached suburban house.”⁸⁶ Our cultural norms of property ownership embrace a liberal individualism in which a landowner’s interests and desires often exist

⁸¹ Michael A. Light, *Different Ideas of the City: Origins of Metropolitan Land-Use Regimes in the United States, Germany and Switzerland*, 24 YALE J. INT’L L. 577, 586, 588 (1999). In some cases, of course, there might be county land use regulations there, but these are often not as stringent as those of a municipality.

⁸² The assumption here is that cultural values influence a society’s legal definition of property. Eric Freyfogle argues that “[i]f private property is a human creation, a mere mental abstraction, then it is something that a culture can change if and when it so chooses.” *The Construction of Ownership*, 1996 U. ILL. L. REV. 173, 177 (1996).

⁸³ Light, *supra* note 81 at 586-90.

⁸⁴ *Id.*

⁸⁵ Kenneth Jackson, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 58 (1985).

⁸⁶ Light, *supra* note 81 at 586, 608. Similarly, urban historian Kenneth Jackson suggests that the “isolated household” has become the American middle-class ideal to such a great extent that it even “represent[s] the individual himself.” *Id.* at 50.

outside of a communal setting and an aggressive property rights rhetoric is rarely tempered by talk of duties and obligations as a responsible community members.⁸⁷

B. A brief history of the German constitution

The German constitution is called the “Basic Law” (*Grundgesetz*), not the “constitution.” This designation expresses the expectation at the time of its promulgation in 1949 that the division of Germany by the Allied forces after the Second World War would be only a temporary measure and that a permanent constitution for the whole country would be written later.⁸⁸

Negative historical experience played a major role in shaping the constitution. The framers, determined to prevent anything similar to National Socialism from happening again, sought to create safeguards against the emergence of either an overly fragmented, multiparty democracy, similar to the Weimar Republic (1918-33), or authoritarian institutions characteristic of the Nazi dictatorship of the Third Reich (1933-45). Most strikingly, the German constitution grants primary importance to human dignity. The first two sentences of the *Grundgesetz* after the preamble read: “Human dignity is inviolable. To respect and protect it is the duty of all state authority.”

The bill of rights (*Grundrechtskatalog*) makes up the first part of the Basic Law. Articles 1 through 19 delineate basic rights that apply to all German citizens, including equality before the law; freedom of speech, assembly, the news media, and worship; freedom from discrimination based on race, gender, religion, or political beliefs; and the right to conscientious objection to compulsory military service. Article 20 provides that “the Federal Republic of Germany is a democratic and social federal state.” Although the word “social” has been commonly interpreted to mean that the state has the responsibility to provide for the basic social welfare of its citizens, the Basic Law does not enumerate specific social duties of the state.

Fundamental disputes about the formulation of the economic order and the property clause, particularly the social obligation, almost held up ratification of the Basic

⁸⁷ Freyfogle, *supra* 82 at 183.

⁸⁸ Von Brünneck, *DIE EIGENTUMSGARANTIE DES GRUNDGESETZES* (1984), 61-71.

Law.⁸⁹ Although most political parties in Germany between 1945 and 1949, including the SPD (Social Democratic Party), the CDU (Christian Democratic Union) and the KPD (Communist Party of Germany), were in favor of a break with the property order of the past and socialization, the Western Allied Powers promoted an economy based on private ownership of the means of production and by the time the *Grundgesetz* was drafted in 1949, the more conservative CDU under Chancellor Adenauer opted for a liberal market-based economy.⁹⁰ The result of the controversy is that the Basic Law is virtually silent on economic matters, with the exception of Article 14, which guarantees “property and the right of inheritance” and provides that “expropriation shall be permitted only in the public weal.”

B. Property protection in the Basic Law

Article 14 consists of the three clauses:

1. (i) Property and the right of inheritance shall be guaranteed. (ii) Their substance and limits shall be determined by law.
2. (i) Property entails obligations. (ii) Its use should also serve the public interest.
3. (i) Expropriation shall only be possible in the public interest. (ii) It may only be ordered by or pursuant to a law which determines the nature and extent of compensation. (iii) Compensation shall reflect a fair balance between the public interest and the interests of those affected. (iv) In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts.⁹¹

For purposes of the discussion below, 14.1.i will be referred to as the guarantee clause; 14.1.ii read with 14.2 as the regulation clause; and 14.3 as the expropriation clause. 14.1.i constitutes a positive guarantee of property. This is a guarantee that both the property itself—including, to some extent, its value—as well as the legal entity of

⁸⁹ Christian Grimm, *Landwirtschaftliches Eigentum und Schutzgebietsausweisungen*, *Diskussionspapier* Nr. 95-R-02, Institut für Wirtschaft, Politik und Recht, Universität für Bodenkultur Wien, July 2002.

⁹⁰ Mostert, *supra* note 79 at 53.

⁹¹ Translation by the Press and Information Office of the Federal Government, Foreign Affairs Division (1994). Note: The three paragraphs of Article 14 are not officially given subsections (i, ii, iii) in the official version of the constitution, but have been numbered here so that they may be referred to throughout the text of this paper.

ownership will be protected in the hands of its owners. 14.2 constitutes a direct social obligation of property owners while 14.1.ii mandates the legislature to define property rights so as to take this obligation into account. The expropriation clause is analogous to our takings clause, imposing a public purpose requirement and duty of compensation on the legislature. An important difference, though, is that it specifies that compensation may only be provided if provided for by a statute.

In contrast to the U.S. Supreme Court, which rarely mentions the purpose of assigning property rights to owners,⁹² the fundamental purpose of the property guarantee is set out at the beginning of almost every important decision.⁹³ In this relatively consistent statement, Article 14 represents a tension between the liberal view of private property (individual property rights justified by natural law) and the social function of property (property rights created and restricted by social context).⁹⁴ The property guarantee is, as summarized by one comparative law scholar,“(a) a fundamental human right, (b) which is meant to secure, for the holder of property, (c) an area of personal liberty (d) in the patrimonial sphere, (e) to enable her to take responsibility for the free development and organization of her own life (f) within the larger social and legal context.”⁹⁵ While elements (a)-(e) emphasize the importance placed on personhood (*Freie Entfaltung der Persönlichkeit* or free development of personhood), especially in the economic sphere, (f) indicates that the content of this guarantee must be defined through legislation that takes account of the social obligation.⁹⁶

On the one hand, property in the German constitution is associated with guarantees to liberty and personhood. For holders of property rights, Article 14 guarantees freedom in the “patrimonial sphere,” enabling holders of property rights to live independently and to freely take responsibility for their own lives. In this sense, private property is considered both an expression and a prerequisite of the individual freedom protected as a fundamental right in the second Article⁹⁷ of the Basic Law. In the words of the Federal Supreme Court, the individual, integrated into the Community of the

⁹² Alexander, *supra* note 2 at 738.

⁹³ Van der Walt, *supra* note 9 at 124.

⁹⁴ Peter Badura, STAATSRECHT 330-331 (2003).

⁹⁵ Van der Walt, *supra* note 9 at 124.

⁹⁶ Rolf Schmidt, GRUNDRECHTE, (2004).

⁹⁷ Article 2 of the *Grundgesetz* provides that “Everyone has the right to the free development of his personality, in so far as he does not violate the rights of others or offend against the constitutional order or morality.”

State, needs a strictly safeguarded sphere of property in order to be able to live as a person among equals.⁹⁸ Thus, the function of the property guarantee in German constitutional theory is to permit the holder of a protected property interest to act freely with the property to control her own economic destiny.⁹⁹

As (f) suggests, however, the property guarantee is not absolute. The social obligation binds the legislator in determining the contents and limits of ownership rights, and the owner, in exercising her rights, to take into consideration the interests of non-owners affected by the exercise of those rights. On the one hand, legislative protection of this interest enables the individual to act upon his or her own initiative and to take responsibility for his or her actions, while participating in the development and functioning of the broader social and economic community.¹⁰⁰ Thus, securing individual freedom in the constitution is thought to secure a broader social system made up of and dependent on the individual freedom of society's participants. At the same time, though, the social obligation in the property clause provides protection for the autonomy and personhood of non-property owners from the impacts of owners' exercise of property rights.¹⁰¹

Therefore, since the purpose of the property guarantee is to secure one's existence by assuring economic and social autonomy, property is constitutionally guaranteed to the extent that it fulfills this "existence-securing"¹⁰² function and only to the extent that it fulfills this function. Beyond this, rights may be up for grabs by the legislature as part of a property owner's social obligation. That is, the *Sozialpflicht* will be concretized by the legislature in the form of limitations on ownership.

1. The guarantee clause

In interpreting the *Grundgesetz* German courts distinguish between fundamental or subjective rights accruing to the individual and institutional guarantees prescribing the fundamental values of the existing social and legal order.¹⁰³ The *Grundrechte* have

⁹⁸ BGHZ 6, 276.

⁹⁹ Mostert, *supra* note 79 at 53.

¹⁰⁰ *Id.* at 226.

¹⁰¹ Quote from Mitbestimmung case, BVerfGE 50, 290. Translation by author.

¹⁰² This is language used in many of the German cases and legal theory, though it may sound awkward in translation.

¹⁰³ Hesse, GRUNDZÜGE DES VERFASSUNGSRECHTS 279, 290-299 (1993).

elements of both. Thus, the property guarantee is understood as comprising two separate but related guarantees: a substantive material or individual guarantee (*Bestandsgarantie*) and an institutional guarantee (*Institutionsgarantie*).

The individual guarantee (*Bestandsgarantie*), usually associated with the classic liberal view of property, protects the individual property holder and her concrete property holdings against specific state interferences. This is a negative guarantee in the sense that the state may only regulate or expropriate away individual property rights, in accordance with legal requirements and for public purposes that are considered more important than the individual property guarantee.¹⁰⁴ In addition to general liberty interests, the *Bestandsgarantie* also protects personhood as a realm for the development of personal autonomy and self-reliance.

The institutional guarantee, on the other hand, recognizes private property in an objective sense as a basic component of a specific economic and ideological model of state organization that the State is obliged to preserve and foster affirmatively.¹⁰⁵ The purpose of this guarantee is to prevent the state from reducing the potential sphere of personal liberty guaranteed by Article 14 by eroding or abolishing the existence, availability and usefulness of property for individuals.¹⁰⁶ In contrast to the individual guarantee, which protects an individual property holder against the expropriation of a specific piece of land, a water use right, or a mineral right, the institutional guarantee prevents the state from eliminating or removing whole categories of property such as land, or water, or minerals in general.

2. The regulation clause

The same clause that positively guarantees property also serves as a mandate to the legislature to limit those rights: “Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law.”¹⁰⁷ The fact that these two sentences stand together in a clause of Article 14 has been called the “cardinal problem” of German property law.¹⁰⁸ Based on 14.1, the FCC has developed an

¹⁰⁴ Van der Walt, *supra* note 9 at 128.

¹⁰⁵ Kimminich in Starck (ed), RIGHTS, INSTITUTIONS AND IMPACT OF INTERNATIONAL LAW (1987), 81.

¹⁰⁶ Mostert, *supra* note 79 at 43.

¹⁰⁷ Article 14.1.

¹⁰⁸ Thomas von Danwitz, *supra* note 71 at 31.

extensive jurisprudence on certain aspects of property that cannot be changed by the legislature. At the same time, 14.1.ii represents a legislative mandate to regulate. As will become clear from the discussion below, the FCC has interpreted this first sentence to constrain the operation of the second, which then defines the scope of the social obligation.

3. The constitutional definition of property

The uniquely constitutional notion of property came about in two of the most significant developments in German constitutional property history—the 1981 *Nassauskiesung* (gravel mining) decision and the *Pflichtexemplar* (obligatory sample) decision handed down the day before. Before these landmark cases, a property owner plaintiff had to elect between two options: she could petition the administrative courts to invalidate an unconstitutionally harsh measure, or she could acquiesce to application of the measure and seek compensation through inverse condemnation (*enteignender Eingriff*), applied directly on the basis of 14.3 by the civil courts.¹⁰⁹

In the Gravel Mining decision, though, the FCC made a sharp distinction between 14.1-2 regulation of property, which is not to be compensated, and 14.3 expropriation, which is compensable. This case involved a landowner’s challenge to a provision of the Water Supply Law (*Wasserhaushaltsgesetz*) that required anyone wishing to use surface or groundwater to obtain a permit. The law had been passed to address the widespread groundwater contamination that resulted from extensive mining of gravel during the period of post-World War II reconstruction. The plaintiff, who had been taking the water for decades as owner and operator of a gravel pit, was denied a permit to use the water beneath his land. The city cited potential despoliation of the public water supply in its denial. In his complaint, the plaintiff alleged that the denial of a permit to continue gravel extraction below the groundwater constituted a taking of his rights in his ongoing business and in his real property.

Although the Court acknowledged that this regulation constituted interference with both the *Bestandsgarantie* (since the property owner had been guaranteed use of this groundwater without permission until the passage of the Water Supply Law) and the

Institutsgarantie (since free development and use of property was not possible without governmental permission), these protections must give way in the case of vital public resources, which occasionally must be entrusted by statute not to the private property owner but to the public at large.¹¹⁰ Thus, if an owner enjoys no right in the groundwater under his property, he has no right that can be taken from him and the court accordingly held this provision to be a property content regulation under 14.1.ii, not a taking under Article 14.3. Subsequent to this opinion, expropriation refers only to the physical confiscation of property and compensation is only available on the basis of 14.3. In other words, there is no longer an equivalent for the U.S. regulatory taking.

If the legislation had constituted a taking, the provision would only have withstood constitutional challenge if the law regulated the type and amount of compensation (*Art und Ausmass der Entschädigung*), as required by 14.III.ii.¹¹¹ If no such regulation existed, then the law would be unconstitutional and any administrative action pursuant to it would be invalid.¹¹² The result of the court's holding in the Gravel Mining Case is that an owner has no constitutional claim for compensation absent a law that provides for compensation (because the civil courts do not have jurisdiction to invalidate the overly harsh administrative action, the other plausible remedy in this situation), and must petition the administrative courts to invalidate the overly harsh administrative action.

5. Property content regulation requiring reimbursement (*ausgleichspflichtige Inhaltsbestimmung*)

After the Gravel Mining decision, the regulation or definition of property rights by the legislature (*Inhalts- und Schrankenbestimmung*) does not, in principle, require payment of compensation. (In fact, as explained above, the owner may no longer elect between invalidation and compensation.) However, one day before the Gravel Mining case, the FCC decided in its Mandatory Sample decision that some regulations would

¹⁰⁹ Courts could only award compensation, though, if the statute specifically provided for it. Thomas Lundmark, *LANDSCAPE, RECREATION, AND TAKINGS IN GERMAN AND AMERICAN LAW* (1997).

¹¹⁰ NJW 1982, 750 (translation by Lundmark, *supra* note 109 at 218).

¹¹¹ The justification for this latter requirement is that it (1) ensures that expropriation only takes place once the compensation question has been cleared by the democratically elected legislature and (2) protects the public from being burdened with expenses not foreseen by the legislature (BVerfGE 47, 268, 287).

¹¹² BVerfGE 24, 367, 418.

only be constitutional if they provided for measures to mitigate excessive burdens on the property owner.¹¹³

The law at issue obliged all publishers to provide, at no cost, one copy of each of their publications to the central state library so that all new publications would be available and preserved in one place. A publisher of high-quality art books printed in small editions objected, claiming that the regulation disproportionately affected him and therefore violated the equality principle (*Gleichheitsatz*). Although the FCC concluded that the law was not an expropriation, but rather a content regulation,¹¹⁴ the Court declared the regulation unconstitutional as applied to this publisher because, when applied to small issues of expensive volumes, the law overstepped the bounds of a reasonable content regulation and violated the equal protection element of 14.I.ii.¹¹⁵

The court called this new legal institution a “content regulation requiring equalization” (*ausgleichspflichtige Inhaltsbestimmung*).¹¹⁶ The so-called *Ausgleichanspruch* (claim for an equalization payment) is something different than the claim for compensation pursuant to Article 14.III expropriation, however. First of all, because the level of a monetary *Ausgleichzahlung* (equalization payment) is determined not by the economic value of the property use or object, but rather by a balancing test that weighs private use against the general good, the property owner generally receives significantly less than she would in the case of compensation for an expropriation. In fact, as will be discussed in more detail below, the FCC has held that this mitigation must not necessarily be monetary and that money is actually only a last resort for other equalization measures (such as variances, grandfathering clauses or phase-in periods). Second, the “content regulation requiring equalization” is derived from 14.1.ii. In other words, after the Mandatory Sample case, restriction on the use of property resulting from 14.1.ii legislation must still, with one exception, be suffered without compensation. The exception is when an otherwise constitutional enactment causes unreasonable hardship in

¹¹³ Donald Kommers, CONSTITUTIONAL JURISPRUDENCE OF GERMANY 568, note 35 to ch. 6 (1997).

¹¹⁴ “The provision contains no executive authorization to take administrative action to seize particular property acquired by the state; rather it establishes a general, theoretical obligation of performance in the form of a donation.” BVerfGE 58, 144 (translation by Lundmark, supra note 109 at 220).

¹¹⁵ BVerfGE 58, 148-150 (“[Conditions placed on the ownership of property] may not lead to an unfair burden, considering its social relationship, the social significance of the particular object, and also considering the regulatory purpose; they may not lead to unfair harshness nor unreasonably impair the owner’s proprietary rights. Furthermore, the equal protection clause must be observed.” Translation by Lundmark, supra note 109 at 220.)

¹¹⁶ BVerfGE 58, 150.

its application. The equalization payment is thought to discharge violations of the reasonableness principle and the constitutional guarantee of property that would otherwise result.¹¹⁷

Just like compensation for a 14.III expropriation, though, a property owner only has claim to *Ausgleich* (equalization) if the payment or softening measure is provided for in legislation. The property holder may, however, attack the validity of a regulatory measure that does not provide for this “equalization,” and the law will be declared void if the court determines that it does, indeed, constitute a disproportionate burden without provision of the compensation or “equalization” described above.

D. The German judicial system

The judicial system in Germany represents a compromise between state (*Land*) independence in judicial matters and the desire for legal unity.¹¹⁸ There are state-level civil courts in every *Land* as well as more specialized federal courts scattered throughout the country to ensure that the law is interpreted uniformly.¹¹⁹ Divided into different fields of jurisdiction, the highest federal courts include: the Federal Supreme Court (*Bundesgerichtshof*, hereafter “FSC,” the highest federal court in civil matters), the Federal Administrative Court (*Bundesverwaltungsgericht*), the Federal Labor Court, (*Bundesarbeitsgericht*), the Federal Social Court (*Bundessozialgericht*), and the Federal Tax Court (*Bundesfinanzhof*).¹²⁰

In the field of property law, jurisdiction is divided between administrative courts (where the Federal Administrative Court is the court of final instance) and what are referred to as “ordinary courts” (where the FSC is the final instance). While the administrative courts have jurisdiction over review of administrative decisions and actions pertaining to expropriation, ordinary courts have jurisdiction with regard to compensation that must be paid for expropriations (i.e., in the case that the amount of compensation is contested). Because these issues are interrelated, both courts have been

¹¹⁷ Lundmark, *supra* note 109, at 221.

¹¹⁸ Nigel Foster, *GERMAN LEGAL SYSTEM AND LAWS*, 39-41 (1996).

¹¹⁹ *Id.*

¹²⁰ As provided for by Article 95 of the *Grundgesetz*, which describes courts of ordinary jurisdiction (civil courts), administrative courts, labor courts, social courts and revenue courts.

forced to interpret 14.2.ii's public welfare provision and to consider when compensation must be paid, and therefore effectively share jurisdiction in setting the standards according to which public and private interests in property regulation are balanced.¹²¹

In addition to these two courts, there is the FCC, which has the function of protecting, interpreting and applying the Basic Law.¹²² This court does not function as another higher instance of other branches of the judiciary but rather only has jurisdiction on questions about whether legislation, actions of the state or court decisions are in accordance with the Basic Law. The FCC has also developed its own interpretation of the property clause, which does not always coincide with either that of the FSC or the Federal Administrative Court. Although shared jurisdiction in matters pertaining to the property clause has led to three different interpretations of Article 14, the FCC is usually considered to be the most persuasive authority and its decisions will be the focus of this paper.¹²³

VII. The positive property guarantee in the *Grundgesetz*

The U.S. Constitution does not “create” or guarantee property rights. Rather, the takings clause and due process protect infringement of such rights created by other laws. In contrast to this negative property guarantee, which is also found in many other constitutions,¹²⁴ Article 14 of the *Grundgesetz* contains a positive guarantee of private property as 1) an institution (*Institutsgarantie*) as well as 2) a subjective right of the individual to a certain constitutionally-protected *Bestand* (“condition”) of property. Although this is not an absolute right—ownership is subject to a social obligation, also spelled out in the Basic Law in a clause that permits considerable regulation—its status in the *Grundgesetz* is that of a fundamental right¹²⁵ with an identity independent of ordinary laws.¹²⁶ In other words, separate from the “property” defined by individual rights created

¹²¹ Kommers, *supra* note 113 at 253.

¹²² The *Gerichtsverfassungsgesetz* (the Constitutional Court Law) regulates the judicial structure and organization of the FCC.

¹²³ Lundmark, *supra* note 109, at 215.

¹²⁴ Negative guarantees are also found in France and South Africa, for example. Van der Walt, *supra* note 9 at 124.

¹²⁵ David P. Currie, THE CONSTITUTION AND THE FEDERAL REPUBLIC OF GERMANY 12, 298 (1994); Van der Walt, *supra* note 9 at 124. The German Federal Constitutional Court (“FCC”) also refers to it as a “fundamental right.”

¹²⁶ The FCC said in the Gravel Mining decision that a private law notion of property is not authoritative for constitutional purposes, and that it is necessary to develop a specific constitutional conception of property.

in civil law is the constitutional property concept developed by the FCC. As became clear in the Gravel Mining decision discussed above, this constitutional property is much broader than private law ownership.¹²⁷ Such an approach enables the courts to interpret the meaning of property so as to give more weight either to social justice or to individual freedom, depending on the demands of society at a given moment.¹²⁸

Even more unusual than the existence of this positive guarantee is the extensive theory that has been developed in German law to explain the separate meaning of this phrase.¹²⁹ Just as in the U.S., the German FCC has examined environmental protection regulation, historic preservation measures, building moratoria, redevelopment schemes and rent control. Yet, instead of asking, as do U.S. courts, whether a regulation has gone “too far,”¹³⁰ German decisions have focused on which rights of ownership must be left over after legislative definition—what the legislature cannot regulate away. This focus on the constitutionally-guaranteed sphere of rights (the *Kernbereich* or “core field”) existing independently of positive law is also important to circumscribing the *Sozialpflicht* because property owners may only be called upon to sacrifice property use for the public welfare insofar as this *Kernbereich* is not infringed.¹³¹

Although property rights may be enjoying an ascendancy of sorts in the U.S., they still have not yet taken a place alongside non-economic civil liberties (such as freedom of speech, association or religion) in the degree of judicial scrutiny and distrust of government that courts deem appropriate.¹³² Indeed, property is not recognized as a fundamental right in U.S. jurisprudence in contrast to Germany, where economic independence is understood to be essential to every other freedom.¹³³ In contrast to liberty interests or the right to make autonomous decisions about highly personal matters,

¹²⁷ Mostert, *supra* note 79 at 21.

¹²⁸ *Id.* At 38.

¹²⁹ In fact, most jurisdictions with positive formulations have developed very little theory concerning the meaning of this positive protection. Van der Walt, *supra* note 9 at 124 (referring to Canada, Ireland and South Africa, among others).

¹³⁰ *Penn Coal*, 260 U.S. at 415 (1922).

¹³¹ Leisner, *supra* note 70 at 25.

¹³² See, e.g. Alexander, *supra* note 2 at 733-734. “From the renaissance of the Takings Clause to state legislation requiring that compensation be paid for a broad range of regulatory restrictions, the property rights movement has scored impressive gains within the past several years.... the pendulum seems to have swung in favor of the movement.” Consider also the recent referendum approved by Oregon voters to require government compensation for regulatory takings. See, e.g. Felicity Barringer, *Property Rights Law May Alter Oregon Landscape*, Nov. 26, 2004.

¹³³ Currie, *supra* note 125 at 29. The Supreme Court has also acknowledged this disparity. “We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth

such as abortion,¹³⁴ childrearing,¹³⁵ or life-sustaining medical procedures,¹³⁶ all of which courts consider fundamental and uphold encroachment on only for “compelling” governmental objectives, property rights cannot resist any measure that passes a weak “rationality” standard under substantive due process theories.¹³⁷ In fact, no modern Supreme Court decision has recognized a property right as fundamental for substantive due process purposes. Although property rights have gained greater protection under the takings clause over time,¹³⁸ “the decisions hailed by property rights partisans and property owners as paradigm-shifting victories—*First English*, *Lucas*, *Nollan* and *Dolan*—remain “doctrinally cautious and often limited in application.”¹³⁹ Moreover, the Supreme Court rarely finds regulatory taking based on land-use restrictions in the absence of either physical invasion or total deprivation of economic use.¹⁴⁰

In a country widely regarded as fiercely protective of property rights, why is property not positively guaranteed in the Constitution and why is the right to private property not considered a fundamental right? Given that classical legal philosophy and political theory advocated private property rights zealously,¹⁴¹ attributing to ownership the same sacrosanct status as rights to life and liberty, it might be argued that this generally shared belief made it unnecessary for a Constitution based on the possessive individualism of 18th century revolutionary declarations to grant specific protection to property beyond the takings clause.¹⁴² Since the government proposed by the Constitution was one of limited and enumerated powers, the general right of property

Amendment, should be relegated to the status of a poor relation. . . .” *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

¹³⁴ *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹³⁵ *Troxel v. Granville*, 530 U.S. 57 (2000) (Court held that compulsory visitation violated a mother’s due process rights).

¹³⁶ *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

¹³⁷ Meltz, *supra* note 14 at 117-118. Although courts have long confused the two, substantive due process and takings are theoretically distinct bases for challenging government actions in land use regulation. Takings law is “largely focused on the economic impact or the intrusiveness of government control” while substantive due process primarily examines the fit between the government’s chosen means and its desired end. An irrational government act (violating due process) might have little economic impact (causing no taking) and vice versa. There are also differences in remedy. Takings generally require the government to compensate the landowner whereas violations of due process mean that the government action is invalid, rather than compensable. In practice, however, the distinction is not always so clear. The cases of *Loretto* or *Hodel v. Irving*, for example, had negligible economic impact but were found to be takings.

¹³⁸ Alexander, *supra* note 2 at 735.

¹³⁹ Meltz, *supra* note 14 at 9.

¹⁴⁰ Meltz, *supra* note 14 at 9.

¹⁴¹ Blackstone may have introduced the strongest form of this rhetoric. “So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.” William Blackstone, *Commentaries on the Laws of England*, vol. I, 139 (reprint, 1979).

ownership may have not been specifically protected because the Framers preferred to avoid confining freedom to stated rights which could never comprehend the whole of liberties.¹⁴³

Another possible reason, however, that there is no “fundamental right” to property protection in our constitution is that property under U.S. law is largely viewed as an artificial creation of law and not a human right created by the constitution itself, as in Germany.¹⁴⁴ As the Supreme Court made clear in *Webb’s Fabulous Pharmacies v. Beckwith*, property rights are “created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law.”¹⁴⁵

A. Article 14 in the *Grundgesetz*: More than a worth guarantee

Unlike the Fifth Amendment’s negative guarantee, the Article 14 positive guarantee is not limited to providing monetary compensation for a “taking” of property rights.¹⁴⁶ The fact that part of a property *Bestand* is inviolable reflects the fact that property is not considered fungible as a guarantee of economic value in the German constitution, but rather regarded as a human right.¹⁴⁷ The FCC has distinguished the Basic Law’s Article 14 from Article 143 of the earlier Weimar Constitution (which guaranteed the economic value of property) to illustrate the fundamental difference between a negative and positive property clause: “The function of Article 14 is not primarily to prevent the taking of property without compensation... but rather to secure existing property in the hands of its owners.” Although Article 14’s positive formulation may include a guarantee of property’s value in the sense that compensated expropriation

¹⁴² Norman Dorsen, *COMPARATIVE CONSTITUTIONALISM* 1156 (2003).

¹⁴³ *Id.*

¹⁴⁴ In the Gravel Mining decision, the Court writes that property guaranteed by the constitution cannot be derived from regular law, but rather must be taken “from the constitution itself.” BVerfGE 58, 300 (335). (Translation by author.)

¹⁴⁵ 449 U.S. 155, 161 (1980).

¹⁴⁶ Other than asking for compensation, the only recourse a U.S. property owner has to challenge a land-use regulation as a taking is under the public purpose requirement. However, because this requirement is broadly interpreted by the Supreme Court, it is the rare regulation that is invalidated entirely rather than compensated under the Fifth Amendment. *See, e.g., Hawaii Housing Authority et al. v. Midkiff et al.*, 467 U.S. 229 (1984). But notice that the *Kilo* case is pending before the Supreme Court.

¹⁴⁷ In the German bill of rights, human dignity influences the interpretation and application of all aspects of the property clause. In fact, some scholars maintain that the fundamental rights in the Basic Law are ranked according to their importance, human dignity the most important of all, with the result that the property guarantee is primarily a guarantee for the protection of personal liberty and not for the protection of property as such. *See e.g., Leisner, supra* note 70, at 1025.

or mitigated regulation may be acceptable in some cases, “this view does not reflect the [full] purpose and spirit of Article 14.” As opposed to the Weimar Constitution, where “the judiciary had to be concerned primarily with protecting property owners through compensation,”¹⁴⁸ and where therefore “the basic right [of property] emerged more and more into a demand for adequate compensation,” Article 14’s property guarantee must be seen in relationship to the purpose of property protection—to secure a realm of freedom within which persons engage in self-defining activity and control their own destinies.

Thus, Article 14 serves the property owner as a defensive or negative right or shield from state intervention, in the tradition of political liberalism in which the U.S. takings clause is also grounded.¹⁴⁹ Yet the property right under the *Grundgesetz* is not primarily a material guarantee, but a personal one.¹⁵⁰ In contrast to the neoclassical role of property protection as an economic entitlement,¹⁵¹ the German scheme of constitutional property reflects a republican ideal of moral and civic duty that is largely absent from classical economic liberalism.¹⁵²

As the legislature continues to update the constitutional conception of property to take account of a property object’s social context, it is obligated to uphold both the subjective and the institutional property guarantees. Accordingly, the FCC has developed a sophisticated jurisprudence on what cannot be defined away by the judicially interpreted constitutional concept of property. Most important here is the notion of *Privatnutzigkeit* (private use), referring to what the Court considers the defining characteristic of positively guaranteed property (and, therefore, the absolute limit on state regulation). Property no longer “deserves” the name “property,” the Court has said, when an owner can no longer derive any valuable use out of it. While private use may, of course, be restricted by the social obligation, the social obligation may only limit the

¹⁴⁸ This is largely because courts did not review the constitutionality of expropriation laws.

¹⁴⁹ von Danwitz, *supra* note 71 at 156.

¹⁵⁰ Dorsen, *supra* note 142 at 1162.

¹⁵¹ In the spirit of the familiar American civic argument that good citizenship requires individuals to sometimes sacrifice their private interests for the well-being of the community, Gregory Alexander describes a republican conception of property that emphasizes the social obligations attached to land ownership and stresses the role played by property ownership in collective life. The role of property in this view is to satisfy individuals’ needs so that they can contribute to the commonwealth as independent citizens. Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970*, 375 (1997).

¹⁵² Alexander, *supra* note 2 at 769. There are, of course, a few civic duties under U.S. law—such as jury duty or the military draft—that may reflect the kernel of what Alexander describes as a republican conception of property ownership.

individual's freedom to use property to the extent that she still has private use for the object of property protection.

B. What does the 5th Amendment guarantee?

1. Is this a worth guarantee?

Under what Gregory Alexander terms the “property as commodity” view prevalent in the U.S.,¹⁵³ the core—though not the only—purpose of property as a constitutional value is individual preference satisfaction. In other words, property serves to define in material terms the legal and political sphere within which individuals are free to pursue their own private agendas, free from governmental coercion, and in this sense the 5th Amendment property clause serves as a basic right used to block “legislative or regulatory redistributive measures that frustrate the full satisfaction of individual preferences.”¹⁵⁴

In a constitutional property jurisprudence that increasingly develops in the context of takings, rather than substantive due process, challenges,¹⁵⁵ the worth of property is protected. “Property interests that would receive minimal protection under German constitutional law because they do not immediately implicate the fundamental values of human dignity and self-realization receive increasingly strong protection under American constitutional law,” according to Alexander. “Land held for the sole purpose of market speculation is as apt under the U.S. Constitution, perhaps more apt, to receive strong protection as is a tenant’s interest in remaining in her home.”¹⁵⁶ Indeed, there are few, if any, instances where the Court has explicitly accorded greater protection to a property right implicating personhood interests than one involving a purely speculative investment.

¹⁵³ Alexander, *supra* note 151 at 1-2.

¹⁵⁴ Alexander, *supra* note 151 at 375; Frank Michelman describes this similarly as the “possessive conception” of constitutional property rights, in which property is a negative claim that the owner has against others, including the state, not to interfere with her use, possession and enjoyment of her property and the right to be free from redistributive actions by the state that take away any portion of one’s interest in property. *Possession vs. Distribution in the Constitutional Idea of Property*, IOWA LAW REVIEW 72 (1987). C.B. Macpherson also labeled the neo-classical conception “possessive individualism” in THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM (1962).

¹⁵⁵ Alexander, *supra* note 2 at 740.

¹⁵⁶ *Id.*

Moreover, the Court has rarely, if at all, expressed skepticism for the importance of protecting property uses that are pure profit-making or speculation. Scalia's dissent in *Palazzolo* even seems to affirm the equal treatment of such interests in takings jurisprudence: "This is not much different from the windfalls that occur every day at stock exchanges or antique auctions, where the knowledgeable (or the venturesome) profit at the expense of the ignorant (or the risk averse)."¹⁵⁷ As one scholar notes, the Supreme Court seems to view "taking a dollar from a homeless person [as] functionally equivalent to taking a dollar from a millionaire,"¹⁵⁸ reflecting a general reticence to conduct an individualized analysis of the property owner's dependence on or relationship to the object of protection.¹⁵⁹

Indeed, an owner's interest in property and the impact of government regulation are often defined in terms of economic value in U.S. law, in contrast to the German courts' rhetoric of dignity and autonomy. As first established in *Penn Central*, which remains the Court's "polestar,"¹⁶⁰ the Court's test for both deprivations of all value and partial regulatory takings has remained focused on the economic impact of government regulation in relation to the purpose furthered¹⁶¹ and on whether the deprivation is contrary to reasonable investment-backed expectations.¹⁶² "[T]he Takings Clause... protects private expectations," according to Justice Kennedy, "to ensure private investment."¹⁶³

2. A purely constitutional notion of property in U.S. law

Though economic worth is a defining characteristic of constitutionally-protected property rights, the Supreme Court has never settled on an essential "stick" from the "bundle" or quantum of property rights that is unconditionally guaranteed by the Constitution. What courts and commentators do often agree on, however, is that the power to regulate is not boundless. It is hard to imagine a state purpose so compelling

¹⁵⁷ *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001).

¹⁵⁸ Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 *Env'tl. L.* 175, 189 (2004).

¹⁵⁹ *Id.* at 92.

¹⁶⁰ 533 U.S. at 633.

¹⁶¹ *See Yee v. Escondido*, 503 U.S. 519, 523 (1992) (Regulatory takings cases "necessarily entail complex factual assessments of the purposes and economic effects of government actions").

¹⁶² Kennedy concurrence in *Lucas*, 505 U.S. 1034.

¹⁶³ 505 U.S. at 1033.

that “*any* competing use must yield,” Scalia wrote in his *Lucas* opinion.¹⁶⁴ In *Palazzolo* Kennedy similarly suggests that there must be some limit to the State’s authority to shape and define property rights and reasonable investment-backed expectations, even when the property owner takes title with notice of the regulation.¹⁶⁵

Otherwise, there is an “inherent circularity” to a definition of property set by the legislature. “If the owner’s reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what the courts say it is.”¹⁶⁶ Thus, a limit on the police power to redefine these expectations—a positive guarantee backed by constitutional norms—*must* be read into the U.S. property clause if the 5th Amendment is to have meaning at all.¹⁶⁷

It is interesting then, as a comparative note, that FCC jurisprudence first mentioned an exclusively constitutional notion of property as justification for expanding the scope of public control over land use. In the watershed Gravel Mining decision¹⁶⁸ mentioned above, the Court departed from its own previous view that property must be considered in light of its historical development under the Civil Code and held that the constitutional notion of property was derived from neither ordinary statutes nor private law regulations, but rather from the constitution’s private guarantee itself. What was most novel about the Gravel Mining decision is that the Court explicitly recognized that the constitutional concept of property realizes a particular social model. Although the legislature might carry out the task of defining property in terms of particular rights or duties, the Constitutional Court, in interpreting the constitutional notion of property at any moment in time, determines the balance between this content and its limitations, between the fundamental protection of private property and the social obligation to use that property with regard for the greater welfare.

¹⁶⁴ 505 U.S. 1003, 1025; Scalia argues that an approach that “would essentially nullify *Mahon*’s affirmation of limits to the noncompensable exercise of the police power” or that suggests “that title is somehow held subject to the ‘implied limitation’ that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.” 508 U.S. at 1003, 1028.

¹⁶⁵ 533 U.S. at 629.

¹⁶⁶ 505 U.S. 1003, 1034.

¹⁶⁷¹⁶⁷ Laurence Tribe, *AMERICAN CONSTITUTIONAL LAW* 465 (1978) (“[T]he expectations protected by the [takings] clause must have their source outside the positive law of the state. Grounded in custom or necessity, those expectations achieve protected status not because the state has deigned to accord them protection but because constitutional norms entitle them to protection.”); Richard Epstein, *TAKINGS* 304-5 (1985), Frank Michelman, *Property as a Constitutional Right*, 38 *WASH. & LEE. L. REV.* 1097, 1103 (1981), all quoted in Peterson, *supra* note 54 at FN 56.

¹⁶⁸ BVerfGE 58, 225, 300.

V. Comparing the U.S. social obligation with the German *Sozialpflicht*

A. Germany's *Sozialpflicht*

The regulation clause, 14.1.ii, is interpreted by courts as a directive to the legislature to carry out 14.2's mandate: to foster a property regime in which the conditions are favorable for all to acquire property and where those property rights incorporate, in the form of limitations imposed by the legislature, the externalities they create for non-owners and society at large. The extent to which the legislature may regulate these ownership rights corresponds to the social function served by the object of those rights, as measured by the property's importance for fulfilling the self-development and self realization purposes of constitutional property protection.

The tone of the property rights discourse forming a backdrop to the social obligation imposed on the legislature and property owners is not nearly as shrill as ours. In fact, there is a remarkable "absence of major debate in Germany about the need for ...an elaborate system of land use planning."¹⁶⁹ This is not, however, a function of "lack of attention to land use issues," but rather the fact "that German land use planning experts—particularly those who are geographers or planners, rather than lawyers—seem to presume that a state inherently has the power and obligation to engage in extensive land use planning."¹⁷⁰

As will be explored in greater depth below, the social obligation in Germany is broader in scope than any analog in U.S. law. Just as in the U.S., the ownership of property in Germany does not include the right to cause a public nuisance.¹⁷¹ Uncontroversial regulations include, for example, the right to prevent mining companies from depleting groundwater supplies¹⁷² or to destroy dogs suspected of having rabies.¹⁷³ Although the *Sozialpflicht* naturally encompasses the legislature's duty to prohibit any

¹⁶⁹ Larsen, *supra* note 77 at 1017.

¹⁷⁰ *Id.* at 1017-18. Other reasons he offers are "the system's success in contributing to a high level of living conditions for a very large part of society—no small feat in a country as densely populated as Germany" and the fact that "the German system succeeds at creating the consensus necessary to implement such a far-reaching land use planning program."

¹⁷¹ Fritz Ossenbühl, STAATSHAFTUNGSRECHT 395 (1998); BVerfGE 20, 351.

¹⁷² BVerfGE 10, 89, 112-14 (1959).

noxious property use, 14.1.ii has neither been limited to prevention of nuisance in its interpretation by courts nor tied to the harm-prevention concept so important in U.S. law. Courts do not even stretch to characterize most enactments of the *Sozialpflicht* as prevention of a nuisance. Indeed, in its perception of ownership as socially tied, the social obligation clause is much “broader than the minimal duty to avoid creating a public nuisance,” and therefore looks different than the takings clause in the American constitution.¹⁷⁴

In general, the *Sozialbindung* refers to the justification for all limitations on property imposed by sovereign acts of the state that do not lead to compensation for expropriation. This includes all constitutional laws, regulations and measures enacted under Article 14.2 that do not satisfy either of two criteria. Such legislative definitions of property must not: 1) constitute *Güterbeschaffung* (a physical confiscation of property),¹⁷⁵ an essential criterion for the Court’s most recent *enger Enteignungsbegriff* (narrow expropriation term), or 2) belong to the “certain aspects of property which cannot be changed by the legislature” (the positively guaranteed *Kernbereich*). In other words, the State may regulate private property rights as an exercise of the social obligation so long as the act neither constitutes a “taking” nor infringes the constitutionally-defined set of core property rights (the *Kernbereich*).

An Article 14 expropriation is narrower than the U.S. Fifth Amendment, under which a land-use control in some cases may be characterized as a compensable regulatory taking. A land-use regulation under German law is not identified as an expropriation on the basis of its intensity, scope or unequally distributed burden,¹⁷⁶ but rather distinguished formalistically by its form and purpose. Property must be physically removed from its owner (*Güterbeschaffung*) and the measure specifically intended to limit property rights (rather than the inadvertent consequence of an illegal or negligent state act) for it to constitute an expropriation. In the case that a measure does not fulfill either of these requirements, it cannot be an expropriation, no matter how intense the impact on the owner is. Even in the absence of an expropriation, the Court may decide that a regulation

¹⁷³ BVerfGE 20, 351, 355-62 (1966)

¹⁷⁴ Alexander, *supra* note 2 at 750.

¹⁷⁵ This is an essential criterion for takings as defined by the Constitutional Court’s most recent narrow “takings” term.

¹⁷⁶ BVerfGE 100, 240—“The categorization of the law [as an expropriation or a determination of contents and limitations] is independent of the intensity of the burden on the rights bearer.”

eliminates an owner's right to exert dominion over her property or her private use of the property—that it infringes the *Kernbereich*, in other words. This latter category of regulations are not considered expropriations, though, and the plaintiff is only entitled to injunctive relief. In these cases, the State may not engage in such regulation, even if it pays.

Therefore, the regulatory taking does not exist in German law and any limitation of property rights that does not fall under one of the narrow categories described above¹⁷⁷ may, in principle, be an expression of the social commitment of property.¹⁷⁸ This does not mean, however, that the property owner must withstand any measure enacted under the contents and limitations clause without any sort of compensation. Individual property owners may bring facial challenges to measures enacted by the legislature, arguing that a particular law does not take into account landowners who are disproportionately burdened by its provisions by providing compensatory measures, *Ausgleichsleistungen* (the equalization payments described above). A claim that a particular landowner was entitled, but not awarded, compensatory measures for which a specific law provides may also be brought.

1. The direct obligation

The social obligation, in the second clause of Article 14, is interpreted as a direct mandate for property owners and the legislature.¹⁷⁹ This encompasses not only a duty to refrain from socially unjust uses (*Unterlassen sozialwidriger Eigentumsnutzungen*), but also an affirmative duty to engage in socially just uses (*sozialgerechte Nutzungen*). In other words, without any further legislation or interpretation by the legislator, self-executing limitations on the property owner's use of his land can be derived from the constitution itself.¹⁸⁰ Furthermore, so long as the private property owner exercises his property rights “responsibly” (i.e. with an eye to the common good), interference by the

¹⁷⁷ It is only since 1979 that the FCC has used the *enger Enteignungsbegriff* (narrow takings expression); earlier, under the *weiter Enteignungsbegriff* (wide takings expression), an approach closer to our own regulatory takings doctrine was possible, where expropriations could be found in the case of limitation of ownership rights. The problem here was that this “softening” of the takings institute was seen as hollowing the contents and limitations clause of meaning, since this provision is characterized by its limitation of property rights.

¹⁷⁸ Fritz Stein, STAATSRECHT (1984).

¹⁷⁹ T. Maunz & G. Dürer, GRUNDGESETZ KOMMENTAR 169 (2002).

¹⁸⁰ *Id.*

state in these rights requires justification.¹⁸¹ There are no direct legal consequences of 14.2, though.¹⁸² Only regulation legitimized by the legislature or administrative authority empowered by the legislature can impose binding obligations on the landowner.¹⁸³

2. The indirect obligation

The legislature, empowered to shape property rights by Art. 14.I.ii (“the contents and limits clause”), must balance the public good against the positive guarantee, which represents the owner’s own interests.¹⁸⁴ This requirement to balance the competing public and individual interests at issue is known as the *Abwägungsgebot* (“the duty to weigh.”) The central question in this determination is whether or not a regulation is *verhältnismässig* (proportionate) or reasonable for the property owner. The principle of *Verhältnismässigkeit* (proportionality), a fundamental tool of constitutional interpretation not mentioned explicitly in the Basic Law but well recognized in the scholarship, requires: (1) a legitimate reason for an interference with fundamental rights, (2) an appropriate and necessary means of interference and (3) a proportionate means-end relationship.¹⁸⁵ Among the factors considered by courts in this balancing test are the social function of the relevant type of property; the meaning of the property for the owner; the effect on third parties of use of the property; the suitability of that property use to its site; vested interests and the investment of one’s own capital or effort in use of the property.

The results of this balancing of the factors form the basis for distinguishing between *entschädigungslose* (“noncompensable”)¹⁸⁶ definitions of the *Sozialbindung* by the legislature and *ausgleichspflichtige* regulations (where there is a duty to undertake an *Ausgleichsleistung*, an equalization payment or measure). A regulation that is deemed

¹⁸¹ von Danwitz, *supra* note 71 at 189.

¹⁸² “However, Art. 14.2 only implies a moral appeal, it establishes an ethical but no direct positive legal duties.” Depenheuer, *supra* note 190

¹⁸³ Rudolf Dolzer, PROPERTY AND ENVIRONMENT: THE SOCIAL OBLIGATION INHERENT IN OWNERSHIP: A STUDY OF THE GERMAN CONSTITUTIONAL SETTING 28 (1976).

¹⁸⁴ “In determining the content and limitations of property in the sense of Art. 14 Para. 1 Sent. 1 of the Basic Law, the legislature must bring the protectable interests of the property owner and the needs of the common good into a just equalization and a well-balanced relationship.” BVerfGE 100, 226.

¹⁸⁵ This predates the 1949 writing of the new constitution. An account of its origins can be found in Currie, 307-10.

¹⁸⁶ Translated literally as an “equalization payment.” The FCC has expressly recognized that, although the legislature can eliminate “bestehende Rechtspositionen” (“existing legal positions”) the legislature should provide for transitional measures or some sort of compensation because the limitations can affect the owner just like an expropriation. BVerfGE 93, 121; 93, 165.

non-compensable is to be accepted by the property owner as part of the social obligation.¹⁸⁷ In the exceptional case—where an individual or group of individuals is disproportionately burdened in a particular case by a measure’s limitation of property rights in the public interest—payment of compensation (though generally an amount that is less than the full market value of the property) or non-monetary mitigating measures, such as variances and amortization periods, are required.¹⁸⁸ Meant to soften the impact of a particular regulatory measure for a particular individual or group of individuals, the equalization payment is considered to resemble private law compensation for tort damages more than constitutional compensation for expropriation. The classic instance of application for the *Ausgleichsleistung* is the hardship plaintiff and it was in this context that the doctrine was first developed by the FCC in the 1981 Mandatory Sample decision described above.

Despite the narrow paths available for getting compensation or mitigation, a wide range of land-use regulations fall under the category of non-compensable social obligation. For instance, the reallocation of plots, both developed and undeveloped, within the area of a binding land-use plan for the purpose of reordering or opening up specific new areas for development is not considered a taking, but rather within the legislature’s competence to define property rights. Although this zoning tool (known as *Baulandumlegung*)¹⁸⁹ may require property owners to bear interference in ownership rights for the good of others, the court reasoned that because the purpose of this provision of the Federal Building Code was primarily to reconcile the private interests of property owners with one another and only secondarily to further a public interest (in orderly development¹⁹⁰), this was non-compensable. Furthermore, the reallocation does not deny core rights to plaintiffs, but rather facilitates, above all, owners’ own use of property for

¹⁸⁷ BVerfGE 58, 137

¹⁸⁸ Recall that expropriation, as provided for by 14.3, must be undertaken pursuant to legislation providing for the type and extent of compensation.

¹⁸⁹ *Baulandumlegung* decision, BverfGE 104, 1 (May 22, 2001). Under the *Sollanspruch* in the Federal Building Code, where the reallocation procedure is codified, calculation of the share of redistribution mass due to each property owner involved is based on either the relative size or the relative value of the former plots prior to allocation. (§ 56 Abs. 1 Satz 1 BauGB); and property owners are, insofar as possible, to be allocated plots from within the redistribution mass that have a comparable or equivalent location to the plots which have been contributed. (§ 59 Abs. 1)

¹⁹⁰ The court also points out that property owners will benefit from the public services, such as roads, that will be provided to the reallocated plots. See page 7 of decision.

development, and therefore fulfills the purpose of constitutional property protection rather than denying core rights to the plaintiffs, the FCC reasoned.¹⁹¹

Also to be tolerated by landowners, without compensation, as a part of the social obligation are the extensive regulation of the landlord-tenant relationship, including rent freezes and very limited eviction rights for landlords¹⁹²; obligations to use¹⁹³, maintain and rehabilitate historic buildings¹⁹⁴; development freezes¹⁹⁵ of up to four years when municipalities are changing a land use plan¹⁹⁶; a general right of first refusal for local governments (*Allgemeines Vorkaufsrecht of the Gemeinden*) to purchase land put up for sale by an owner;¹⁹⁷ and the right of the legislature to redefine land ownership so as to exclude groundwater¹⁹⁸ and mineral resources.¹⁹⁹

3. Social function or relevance of property

¹⁹¹ Under the *Sollanspruch* in the Federal Building Code, where the reallocation procedure is codified, calculation of the share of redistribution mass due to each property owner involved is based on either the relative size or the relative value of the former plots prior to allocation, (§ 56 Abs. 1 Satz 1 BauGB); and property owners are, insofar as possible, to be allocated plots from within the redistribution mass that have a comparable or equivalent location to the plots which have been contributed. (§ 59 Abs. 1.)

¹⁹² In the *Wohnraumkündigungsschutzgesetz* Case the FCC reviewed the constitutionality of a federal law that was introduced for a limited period to provide protection for lessees of residential property in view of the housing shortage. This law excluded the right of the lessor to raise the rent and to cancel the lease. BVerfGE 37, 132. BVerfGE 71, 230, 247, known as the *Vergleichsmiete* case, prohibited the raising of rents more than 30 percent.

Although this case represented a unique historical circumstance, protection of tenants in Germany is generally much stronger than in the U.S. Para 574 of the German Civil Code provides that a landlord may only cancel a lease with a “legitimate interest,” which does not include raising the rent. Para. 573 Abs. 2 limits a “legitimate interest” to cases where the tenant is in substantial breach of the contract; the lessor needs the apartment for himself, his family or members of his household; or the lessor would be prevented from realizing a reasonable economic return on his property and therefore suffer considerable disadvantage, though this excludes rental at a higher price.” These cases confirmed that it is a constitutional exercise of the legislature’s contents and limitations power for cancellation of a lease to be dependent on a legitimate interest: BVerfGE 68, 361 (367), BVerfGE 79, 292 (302); BVerfGE 81, 29 (32).

¹⁹³ Sometimes this can be an obligation to use monuments in specific ways. Rudolf Kleeberg, *KULTURGÜTER IN PRIVATBESITZ: HANDBUCH FÜR DAS DENKMAL- UND STEUERRECHT*, RdNr 100 (2001).

¹⁹⁴ Sometimes this can be the restoration of features to a condition that they were not in at the time they were declared monuments. *Id.* at RdNr 110.

¹⁹⁵ During this period no considerable improvements may be made and demolitions are prohibited, Para 14. Abs. 1 Nr. 1, 2 BauGB.

¹⁹⁶ Such a moratorium regularly lasts two years, though it is often extended for another year and in exceptional circumstances may be subject to a second year-long extension. After four years, some sort of monetary compensation is normally required (*Ausgleichspflicht*) and provided for in Para. 18 BauGB. Hager, Kirch

¹⁹⁷ Para. 24, Baugesetzbuch

¹⁹⁸ The Gravel Mining opinion held that the *Wasserhaushaltsgesetz*, which changed the law to require property owners who had been using ground water to obtain permits for its use, was not a “taking,” but an expression of the contents and limits clause. With this case, the FCC returned to a narrow definition of “expropriation” (*Enteignung*), which required the partial or total removal of property from the hands of the owner, rather than just the limitation of its use. BVerfGE 58, 300, 332f.

¹⁹⁹ BVerfGE 94, 23, 27

In defining and redefining property rights the legislature must consider the function of constitutional property protection.²⁰⁰ The more closely that a certain type of property may be tied to the personhood or personal autonomy of its owner, the greater the protection recognized by courts and the less discretion left to the legislature to limit those ownership rights.²⁰¹ Courts have distinguished different types of property from one another based on a hierarchy of uses that takes into account a type of property's importance for the general public or affected third parties.²⁰² Owners of property in land, for example, have a heightened social obligation because of its finite supply.²⁰³ Thus, the court may consider the interests of non-owners and the general public to a greater extent than in the case of types of property without any special relevance. In another example, the legislature may take greater liberties in restricting the property rights of public housing owners²⁰⁴ than owners of private housing because subsidized housing has a special relevance for a socially just system of land ownership.²⁰⁵ The high social importance of publicly subsidized housing and the vulnerability of its occupants within the economic sphere and in shaping their own lives justify expansive regulation by the legislature.²⁰⁶

Courts have also held that there is a hierarchy among various public interests in land use regulation. The protection of natural resources achieved by requiring property owners to remove water or ground pollution, for example, generally corresponds to a greater social responsibility than the promotion of cultural life that is a goal of historic preservation.²⁰⁷ And despite the high priority placed on protection of natural resources,²⁰⁸ certain justifications for protection have more weight than others. Purely aesthetic reasons for conservation are given less weight than ecological considerations,

²⁰⁰ BVerfGE 53, 257 [292].

²⁰¹ Van der Walt explains this as the distance between the type of property and the sphere of individual liberty of the owner.

²⁰² Differentiating among various kinds of property, according to the kind of protection each deserves, as measured against the stated purpose of constitutional property protection, is referred to in the German legal literature as the *Abstufung der eigentumsrechtlichen Grenzen*. *supra* note 79 at 225.

²⁰³ BVerfGE 21, 73 [82f]; "Property in land is neither in its political economical nor in its social meaning to be put on an equal footing with other resources."

²⁰⁴ Public housing (housing available to low-income individuals for below-market rents) may be owned by private owners in Germany.

²⁰⁵ BVerfGE 95, 64/84.

²⁰⁶ BVerfGE 95, 64/84.

²⁰⁷ Evelyn Haass, *Die Baulandumlegung—Inhalts- und Schrankenbestimmung des Eigentums*, NVwZ 272 (2002).

for example.²⁰⁹ Yet, owners of historically or culturally significant buildings are subject to a higher social obligation than owners of buildings not protected by historic preservation legislation, which are deemed less significant. And even among owners of protected buildings, courts have held that the social obligation to maintain and preserve weighs heavier against the private owner's interest in the case of some buildings than others, depending on the buildings' historical or cultural significance.

4. Change of Conditions

The FCC has emphasized repeatedly that the definition of property is dynamic. “The contents and functions of property are capable and in need of adaptation to social and economic conditions. It is the task of the legislature to undertake such adaptation while taking into account the fundamental constitutional values.”²¹⁰ In other words, the legislature may constantly redefine the protectable sphere of constitutional property to correspond to developments in German society, so long as the other principles of constitutional interpretation, such as proportionality, equality and, most important, the positive guarantee, are observed.

The “Small Garden Plot” (*Kleingarten*) decision²¹¹ illustrates the willingness of German courts to respond to developments in German society by adjusting the definition of protected property. In this case, the FCC invalidated a federal statute that had made it virtually impossible for private lessors of small garden plots to cancel their leases. Although it had been common at one time for large landowners to lease land for growing vegetables to city dwellers, this use had been increasingly supplanted by large-scale commercial agricultural production and the plots were now held mainly for recreational uses. The Court reasoned that such a limitation of property rights was no longer required by the social obligation and, therefore, no longer justified by 14.2. The burden on property owners (the lessors) was, therefore, held excessive in relation to the purpose served by the legislation and unconstitutional, according to the Court.

²⁰⁸ Article 20a of the Basic Law provides: “The state, also in its responsibility for future generations, protects the natural foundations of life and the animals in the framework of the constitutional order, by legislation and, according to law and justice, by executive and judiciary.” (Translation by author.)

²⁰⁹ Theodor Maunz, GRUNDGESETZ: KOMMENTAR 227 (RdNr 427) (2002).

²¹⁰ BVerfGE 24, 367 (*Deichordnung* case). Translation by Mostert, *supra* note 79 at 225.

²¹¹ BVerfGE 52, 1 (1979).

The FCC also relied on the doctrine of changed conditions in reviewing the validity of a 1971 federal law introduced, in the face of a housing shortage, to provide additional protection for lessees of residential property in the *Wohnraumkündigungsschutzgesetz* (Eviction Protection Law) case.²¹² This law imposed a blanket prohibition on eviction and only allowed lessors to raise the rent, with the permission of the lessee, to the level of what was normal for similarly-situated properties.²¹³ In finding the provision to be a proportionate exercise of the legislature's 14.1.2 powers and a fair burden for the lessor, the Court emphasized the dire housing shortage of the time.

In a more recent case,²¹⁴ the FSC examined the constitutionality of a special statute²¹⁵ that prohibited landlords from canceling residential leases, even in the case of a “justifiable interest” (*berechtigtes Interesse*)²¹⁶ (a circumstance that had, under the German Civil Code, released owners from lease obligations). Passed right after German re-unification, the legislation aimed to achieve stability in the real estate market by preventing too much property from changing hands during this period. The plaintiff property owner had received a grant from the city redevelopment agency to demolish his building in light of the 38 percent drop in population and associated apartment surplus in the East German city where the case was filed. However, one holdout tenant refused to leave, citing this statute. In striking down the law, the court held that recent demographic trends and related developments in the housing market no longer justified the policy rationale behind the legislation and therefore this measure as a reasonable social obligation.

5. Meaning for the property owner and third parties

The meaning of the relevant property for the particular owner is another key element in the balancing test used by courts to assess the proportionality of government regulation. Not surprisingly, German courts have most explicitly applied this subjective analysis in cases about one's home or residence, closely scrutinizing laws that regulate

²¹² BVerfGE 37, 132

²¹³ If lessees refused to give permission, the lessor could appeal to the court.

²¹⁴ BGH case (Mar. 24, 2004), VIII ZR 188/03.

²¹⁵ Art. 232 Para. 2.2 EGBGB.

²¹⁶ Para. 564b, 573.2.3 of the German Civil Code.

rental property. Given the importance of the home to most individuals, the FCC has not only granted strong protection to the personhood interests of legal owners but also recognized tenants' ownership rights.²¹⁷ The FCC has observed that occupants, like owners, of residential property are dependent on and develop personhood interests in their homes, even if they are rented.²¹⁸ Since this attachment resembles the type of relationship accorded most protection under Article 14, the Court has concluded that lessees may be considered to have separate property interests in the occupied space.²¹⁹

Even before the FCC explicitly recognized ownership rights in tenancy, the Court often considered the impacts of legislatively-determined property rights on non-owners.²²⁰ For instance, a 1985 case²²¹ upheld a section of the Civil Code making a landlord's right to cancel a lease contingent on a justifiable interest.²²² Because "[l]arge parts of the population cannot, for financial reasons, acquire or set up their own homes and are, therefore, in an existential way dependent on the use of foreign property," facing considerable personal, familial, economic and social costs if the right to use that property is lost, the Court reasoned that it was proportionate to make a landlord's right to cancel a tenant's lease dependent on a justifiable interest.²²³

The FCC here affirmed a lower court judgment that a plaintiff wanting to move into a seven-room apartment that she owned did not have a justifiable interest based on *Eigenbedarf* because her interest in moving from a three-room apartment to a larger living space was not important enough to justify displacing the tenant already there.²²⁴ Agreeing with the lower court that "the need portrayed [was], from an objective

²¹⁷ BVerfGE 79, 292, 304; 82, 6, 16; 91, 294, 310.

²¹⁸ The reasoning here is that insofar as the family home can be described as the core of human existence, providing its owner with a secured sphere of freedom where she can take responsibility for the development and control of her own life, the lessee's lease rights fulfill the function which tangible property rights serve others.

²¹⁹ BVerfGE 89, 1.

²²⁰ "Use and disposition do not ever remain solely within the sphere of the property owner, but rather affect the interests of other rights holders, to whom the use of property objects is assigned. Under this premise, the constitutional mandate to pursue a common welfare-oriented use includes a mandate to consider non-owners, who need the use of the property object to secure their own freedom and shape their own self-governing lives." BVerfGE 84, 382/385. See also BVerfGE 68, 361, 368; 71, 230, 247.

²²¹ BVerfGE 68, 361 (367).

²²² Paragraph 564b of the German Civil Code provides that such an interest may be shown when 1) the tenant violates his contractual obligations, 2) the landlord needs the apartment for himself or his family (*Eigenbedarf*) or 3) the landlord is prevented from a reasonable economic use of his property and suffers considerable disadvantage as a result.

²²³ "In light of the personal, familial, economic and social consequences to the tenant that usually go along with moving, restricting the cancellation right of the landlord to cases where he has a justifiable interest in ending the rental relationship seems justified." BVerfGE 68, 361, 370.

²²⁴ BVerfGE 68, 361, 374.

perspective, excessive or exaggerated,”²²⁵ the FCC concluded that this was an exercise of property rights that, in light of the social meaning of the home, is not constitutionally protected.²²⁶ On the other hand, in the case described above in which the FCC struck down the law imposing extraordinary restrictions on lessors in the aftermath of reunification, the court took special note of the fact that the only remaining tenants in the building sought to be demolished had another apartment in a nearby town and were, therefore, not dependent “in an existential way” on this home.²²⁷

The legislature must always consider the living needs or requirements (*Wohnbedarf*) of the property owner, though, the FCC has emphasized.²²⁸ In recognizing that the home is also important to the landlord—“the center of his existence”²²⁹—the court has concluded that *Eigenbedarf* must be subjectively interpreted. For example, the same court that held that the interest of the plaintiff above in moving to a larger apartment that she owned did not constitute *Eigenbedarf* held that the lower court had failed to recognize the justifiable interests of an 89-year-old plaintiff in reclaiming a ground-floor apartment that she owned from the existing tenants. The plaintiff argued that she had difficulties climbing the steps up to her present apartment and wanted to be closer to her daughter, who lived in the same building as the ground-floor apartment she wanted to use. Although the plaintiff was living at the time in an apartment that was, from the perspective of the Court, suitable in all other ways, the FCC was nevertheless concerned that by not allowing the plaintiff to move to the more accessible apartment near her daughter, she had been “considerably restricted in her freedom to lead her life . . . in the way she considers right.”²³⁰ In other words, the Court found the plaintiff’s reasons to be legitimate because they touched upon the core purpose of property protection. In contrast, the ownership rights of the other owner above were not accorded such a great degree of protection by the court because her specific relationship to the property did not implicate the autonomy-securing purpose of property protection to the same extent.

²²⁵ *Id.*

²²⁶ *Id.* at 371.

²²⁷ BGH case (Mar. 24, 2004), VIII ZR 188/03.

²²⁸ BVerfGE 79, 292 (305); 81, 29 (31ff).

²²⁹ BVerfGE 68, 361, 371.

²³⁰ BVerfGE 68, 361, 375.

One case in which, under the Civil Code, even a justified interest is not required for cancellation of a lease is when the landlord lives in such close proximity to a tenant that her own residential and living space is directly affected by the tenant's use of that property. In other words, when the landlord's own sphere of autonomy is directly implicated, her interest in canceling the contract is considered as important as the tenant's interest in remaining.²³¹

6. Situationally-based factors (*Situationsgebundenheit*)

The weight of the regulatory burden on an owner also corresponds to the physical setting and characteristics of the property itself. Distinct from the *Sozialbindung*, which refers to the way in which property interests are determined by the general social function of a type of property, the principle of *Situationsgebundenheit* governs the legislature's determination of the contents and limits of property rights on the basis of physical context and situation. Since the German constitution conceptualizes its citizens as persons living within and dependent upon society, the FSC has reasoned that an owner's rights and duties change over time, as the environmental context of her property changes.²³² As the principle was later formulated by the Federal Administrative Court, the 14.2 direct social obligation on the property owner limits the positive constitutional guarantee to those uses of property that the owner can reasonably expect to continue. This cannot be the case if the owner should have foreseen that the natural characteristics or probable development of the surrounding area would make a use unreasonable.²³³

As the FSC reasoned in the *Grünflächen* (Green Space) decision,²³⁴ an owner is presumed to know, based on the location of her property, that she cannot use that property in certain ways. In that case, the rezoning of land long used for agriculture to open space in a densely developed industrial area was upheld, even though the designation prevented any further development. The city justified the building prohibition as necessary in light of the high population density that had developed since

²³¹ This exception is codified in Para. 373a of the German Civil Code, exempting the landlord who lives in one of two flats in a building from the justifiable interest requirement.

²³² Bodo Pieroth, GRUNDRECHTE, STAATSRECHT II Rdnr 931 (2000); BGHZ 23, 30, 35; 80, 111, 116; 90, 4, 15.

²³³ BVerwGE 38, 209 (219)

²³⁴ BGHZ 23 (30).

the plot was zoned agricultural. This development made the interest of the regional public in health and outdoor recreation especially compelling. In another case, an owner of a plot in the vicinity of a historic chapel was denied a building permit to construct a shed on his property, even though it was zoned for such a structure, because of its proximity to the landmark.²³⁵ In another case, a farm owner who had planted old beech and oak trees on his land (in order to sell them as timber) long before they were designated as protected natural resources,²³⁶ was prohibited from felling those trees.²³⁷ As the FSC has held, property is bound by its situation (*seiner Natur nach*)—its geography, surroundings and natural features—with a certain commitment (*Pflichtigkeit*) that can always, upon the legislature’s exercise of its 14.1.2 competence, intensify to a “duty” (*Pflicht*).²³⁸ As the FSC reasoned in the Gravel Mining case, the property owner was refused a permission to extract gravel because, among other reasons, the area to be developed was a small forest that served as habitat for various animals and that was seen as vital for future regeneration of the area. “[A] rational and reasonable owner, who had not lost sight of the common good, would abstain from gravel extraction.... He would not close his mind to the knowledge that the completely paramount interest of landscape protection requires retention of the remaining forest and compels him to refrain from the otherwise economically rational exploitation of the gravel deposit which lies in his private interests.”²³⁹

Although the direct social obligation on owners (derived from 14.2 of the *Grundgesetz*) may apply in some cases where a once reasonable use no longer corresponds to the current situation, there is a presumption in favor of an already-exercised use that alters the physical state of the property. Such investment of labor or capital by the owner is thought to demonstrate a certain *Situationsberechtigung*

²³⁵ *Kapellenurteil* (Chapel case), BBauBL 1958, s. 1385.

²³⁶ The property was designated as a *Naturdenkmal* (protected natural resource). This designation is among the instruments used by the Federal Nature Protection Act (*Bundesnaturschutzgesetz*) and the Nature Protection Acts of the *Länder* to preserve natural resources. The proclamation of certain areas as nature or landscape preservation areas limits the purposes for which they may be used. Gerhard Robbers, *AN INTRODUCTION TO GERMAN LAW*, Nomos Verlagsgesellschaft, Baden-Baden 2003, 136.

²³⁷ *Buchendom* (Cathedral of Beech Trees) case, DÖV 1957, s. 669.

²³⁸ BGHZ 23, 33.

²³⁹ Gravel Mining Case, 14 *Agrarrecht* 281 (1984), 282. (Translation by Murray Raff, *Environmental Obligations and the Western liberal Property Concept*, at <http://www.arbld.unimelb.edu.au/envjust/papers/allpapers/raff/home.htm#fnB75>.)

(situationally-bound entitlement).²⁴⁰ That is, an already-made use enjoying *Bestandschutz* might suggest that this use is appropriate to the property’s location or situational characteristics and is even thought to change the “situation” of the property.²⁴¹ Thus, the Federal Administrative Court in the *Bayerisches Naturschutzgesetz* (“Bavarian Nature Protection Law”) case,²⁴² upholding as a noncompensable content regulation an administrative action that declared the plaintiff’s shoreline property a nature preserve and prohibited recreational uses, including camping, swimming, rowing, and sailing (and only allowed the owner to make agricultural use of his property as a hay meadow that could be harvested once annually), justified its decision partly by the fact that recreational uses had never been made, which it found hardly surprising given the unsuitability of recreational uses to the plot.

B. U.S. Comparison

1. Social Relevance

There is general consensus among courts and legal scholars that our nuisance-influenced takings doctrine reflects an unstated social obligation that takes into account the social function and relevance of different types of property. However, it remains unsettled how much further this obligation extends than the duty not to do harm—that is, how broadly “harm” is to be interpreted and whether the duty can be construed as an affirmative obligation of property owners to preserve or protect natural or cultural resources for the general public, for example, or whether courts consider the subjective effects of one’s property use on a larger class of non-property owners in upholding regulation.

The California Supreme Court decision *Ehrlich v. City of Culver City*²⁴³ presents a typical borderline case in defining the scope of an owner’s social obligation. *Ehrlich*

²⁴⁰ Article 14 protects the property owner who, in reliance upon his property rights has increased the value of his property, from the sudden devaluation of his property by a change to the legal order. The requirements for this protection, the court has said, is that the property has “set something in motion” (“etwas ins Werk gesetzt hat”), which means that she has contributed labor or capital to value-creating changes. BVerfGE 58, 300 (349).

²⁴¹ BGHZ 105, 15, 20.

²⁴² BVerwGE 94, 1. The law challenged in this case is the *Bayerisches Naturschutzgesetz* (Abs. 36 abs. 2).

²⁴³ 12 Cal. 4th 854 (1996).

involved a challenge by the owner of land that had once been the site of a private health and recreation center²⁴⁴ to the city's imposition of both a \$280,000 "mitigation fee" and an exaction under the city's "art in public places" program as conditions for approval of his request that the property be rezoned to permit construction of a condominium project. The trial and appellate courts saw the situation very differently. While the trial court concluded that the exaction was "simply an effort to shift the cost of providing a public benefit to one no more responsible for the need than any other taxpayer,"²⁴⁵ the Court of Appeals held that the "mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the town home project and for the burden to the community resulting from the loss of recreational facilities."²⁴⁶ After the Supreme Court vacated the appellate court's judgment for reconsideration in light of *Dolan*,²⁴⁷ the state supreme court found the connection between the negative effects that the city could mitigate using its police power and the required dedication insufficient—the record did not support the required "fit" between the monetary exaction and the loss of the parcel zoned for commercial recreational use.²⁴⁸ Although the court acknowledged that the withdrawal of this private land use had adverse public impacts,²⁴⁹ the court carefully distinguished between the value of a recreational use on that parcel and the value of plaintiff's health club. "[T]he loss which the city seeks to mitigate by levying the contested recreational fee is not the loss of any particular recreational facility, but the loss of property reserved for private recreational use."²⁵⁰ That is, the plaintiff could not be made to pay for the loss of the actual facility that he was providing to the community, but rather only for the right not to use his parcel for the use for which it was zoned—that is, for the costs involved in rezoning.

²⁴⁴ The owner demolished the private health club in the course of his legal battle.

²⁴⁵ Los Angeles County Superior Court. Ct. App. No. B055523.

²⁴⁶ *Ehrlich v. City of Culver City*, 15 Cal. App. 4th 1737, 1744 (1993).

²⁴⁷ *Ehrlich v. City of Culver City*, 512 U.S. (1994) (114 S. Ct. 2731).

²⁴⁸ 12 Cal. 4th at 883.

²⁴⁹ "The opportunity of Culver City residents to use such private recreational facilities created a *public* benefit by enlarging the availability of such facilities. Without such a facility, residents would have to travel farther, wait longer, and put up with other inconveniences and restricted choices in their recreational pursuits. Thus, the fact that a recreational facility is privately rather than publicly owned does not erase its value to the public." 12 Cal. 4th at 879. Note that the court's analysis here stands in direct contrast to the trial court on this issue. The trial court, in its memorandum opinion granting judgment for the plaintiff, reasoned, that the "[plaintiff's] club . . . was at all times *private* property; the city never owned any interest in it nor was any part of it ever dedicated to *public* use. . . . [Plaintiff's] actions cannot be said to deprive the *City* of tennis courts, because neither did [plaintiff] have an affirmative duty to provide tennis courts to the City or its residents nor would tennis courts necessarily be available to the City but for [plaintiff's] project. . . ." (quoted in 12 Cal. 4th at 878).

Although U.S. courts no longer seem to link many forms of social obligation to a harm or noxious-use principle,²⁵¹ courts still struggle with the question of which property uses or public purposes must yield to competing land uses. *Ehrlich* is doctrinally about exactions (and, therefore triggers the Supreme Court’s means-end analysis from *Nollan* and *Dolan*), but there is still a question lurking in this case about whether the plaintiff caused a “harm” by refraining from a beneficial use that he had previously engaged in, or why his desired future use must be tied to the provision of a public benefit for the community.

Indeed, there are no shortage of articles describing the Supreme Court’s takings jurisprudence as a “muddle”²⁵² and puzzling over the source and scope of this obligation. Andrea Peterson proposes one model for understanding the outcomes of Supreme Court regulatory takings cases that in some ways resembles the German doctrines for circumscribing the *Sozialpflicht*. By asking “whether the lawmakers reasonably believed that the people of their jurisdiction would consider A’s conduct to be wrongful,” the reviewing court is referring to societal judgments of wrongdoing, she suggests.²⁵³ In *Mugler v. Kansas*, for instance, the Supreme Court refused to find a taking despite serious economic loss to the plaintiff, a brewery owner, where the State of Kansas prohibited the manufacture of alcoholic beverages, a measure that allegedly “represented the moral judgment of the people of Kansas at that time.”²⁵⁴ Peterson does not propose “how judgments of wrongdoing are made,” but her thesis depends “on the assumption that people in our society constantly make judgments as to who is in the wrong in conflicts regarding economically valuable resources” and that “the results reached by the Court in its taking decisions are generally consistent with these societal judgments of wrongdoing.”²⁵⁵

²⁵⁰ 12 Cal. 4th at 883.

²⁵¹ See *Lucas*, 505 U.S. at 1026.

²⁵² See, e.g., Carol Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002).

²⁵³ Peterson, *supra* note 54 at 86.

²⁵⁴ Peterson, *supra* note 54 at 87.

²⁵⁵ Peterson’s moral justification principle is distinct from the harm-benefit test, in which no taking occurs if the government is preventing A from causing harm to others but does occur if the government is requiring a landowner who has not caused harm to benefit others. She also points out that harm is not always considered wrongful (in *Nollan*, for example, Peterson argues that the government had no reasonable basis for concluding that it would be wrong of the Nollans to build without providing lateral public beach access and, therefore, taking occurred even though A’s proposed conduct would have had an adverse impact on others) and wrongdoing does not always involve causing harm to others (she gives the example of state or local legislative body prohibiting the sale of liquor “because the people in

Peterson is, therefore, not necessarily convinced by Scalia's argument that harm is in the "eyes of the beholder" or by Joseph Sax's assertion that "neither takings cases nor nuisance law can be viewed as depending on judgments of blame or wrongdoing" since these cases usually involve "two conflicting land uses, neither of them in the wrong."²⁵⁶ The problem with this "Coasean mode of analysis," she argues, is that it is inconsistent with "ordinary perceptions of the world." In the case of fire regulations imposed upon old wooden buildings in a city, for example, the question of whether "the house owner caused the harm by operating a fire trap" or the building has become a fire trap "because others have made the neighborhood a congested one" is not as difficult as Scalia or Sax would suggest. Although this might be a difficult case "from a Coasean point of view," Peterson argues that the Court would have no problem concluding the regulation did not effect a taking, given "widely shared judgments of wrongdoing"—people "generally regard a building that is a 'firetrap' as creating an undue risk of harm to others."²⁵⁷

Thus, Peterson's account of the Supreme Court's takings cases posits a contextual inquiry by the Court that resembles the German courts' dynamic notion of property. In her model judgments of wrongdoing may change over time and vary geographically, and, therefore, what constitutes a taking also varies over time. "The moral justification principle takes this factor into account by focusing on whether the lawmakers reasonably believed the conduct at issue would be regarded as blameworthy *by the people of that jurisdiction at that time*."²⁵⁸ For instance, laws that once prohibited the manufacture or sale of alcohol no longer correspond to what lawmakers in most jurisdictions believe. On the other hand, a law that prohibited the owner of an historically significant building from destroying its exterior may once have been disfavored whereas today it seems more likely "that lawmakers in many localities could reasonably believe that their constituents would consider it wrong to destroy the exterior of an historically significant building."²⁵⁹ In

that jurisdiction consider such conduct to be immoral, wholly apart from any judgment that such conduct causes harm in any tangible sense" and that "laws embodying such moral judgments are generally assumed not to effect takings." Peterson, *supra* note 54 at 90, 108.

²⁵⁶ Sax, *supra* note 59 at 36-7 (quoted in Peterson, *supra* note 54 at 90).

²⁵⁷ Peterson, *supra* note 54 at 92. See, also Murray Raff, *supra* note 239 at (arguing that U.S. courts might be "edging toward an analysis in which the objective views and expectations of a reasonable and socially minded person are to be considered, and thus implicitly that there are social and environmental obligations in the use of property which may be rendered into positive law without infringing a constitutional guarantee of property.")

²⁵⁸ Peterson, *supra* note 54 at 110

²⁵⁹ Peterson, *supra* note 54 at 111; See also Joseph Sax, PLAYING DARTS WITH REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES 4 (1999) ("Public attitudes reflect an understanding that is in advance of legal theory.

reasoning reminiscent of the German doctrine of *Situationsgebundenheit*, Peterson also describes the case in which a given type of conduct is considered wrongful only in a particular location or under certain circumstances. “For example, a factory in a residential neighborhood may be viewed as a nuisance, although it would be readily acceptable in an industrial neighborhood. The judgment is merely that it is wrong to act in this manner in this particular location.”²⁶⁰

Even Peterson’s theory does not locate an affirmative obligation in property ownership under Supreme Court jurisprudence. Her theory would not, for instance, explain the German cases that require property owners to preserve their land as open space²⁶¹ or to expend resources to maintain historically significant structures.²⁶² It does not assert an expansive social obligation justified, as it is in Germany, by nothing more than one’s general obligation as a citizen to consider one’s relationship to the social order and community in exercising one’s rights. Without the fulcrum notion of the positive guarantee—and what that is meant to protect (dignity and autonomy)—one’s default position as a property owner under U.S. law is not limited, as it is in Germany, to some notion of a reasonable profit. Rather, one is entitled to exploit one’s property, even under Peterson’s theory, until the point that one’s community disapproves.

2. Meaning of property to the owner

In contrast to Germany, the relative political and economic power of the injured landowner—and, therefore, the subjective meaning of property for that owner—is not taken into consideration under U.S. law, at least partly because “our entrenched understanding of judicial discourse regards any consideration of these issues in deciding specific cases as crude and inappropriate.”²⁶³ Although Hanoch Dagan argues that *Hodel*

A sense that the fate of some objects is momentous for the community at large has certainly insinuated itself into the public consciousness... they led to today’s historic preservation laws.”)

²⁶⁰ Peterson, *supra* note 54 at 89.

²⁶¹ See, e.g. the Green Space decision, BGHZ 23, 30 or the Bavarian Nature Protection Law case, both described above in Section V.A.6.

²⁶² In 5 of the German states, for example, owners can be compelled by administrative action to use their property in a certain way. Kiesow Gottfried, *DENKMALPFLEGE IN DEUTSCHLAND: EINE EINFÜHRUNG*, 96 (2000). There is also an express duty to make and keep up with repairs and improvements to structural elements as well as interior elements, in 8 states. This even applies in some cases to damages incurred before the structure was placed under preservation protection. *Id.* at 100.

²⁶³ Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 782.

*v. Irving*²⁶⁴—in which the Supreme Court struck down a section of the Indian Land Consolidation Act that provided for undivided fractional interests in certain small allotments of land²⁶⁵ to revert to the tribe upon the death of the interest owner—represents “an extreme example of cases where the plaintiff’s political and economic power is so low that our egalitarian commitments may well require the use of a side-constraint,”²⁶⁶ Dagan’s interpretation has not been widely adopted. Even though “the same regulation can have different constitutional significance as applied to different claimants,”²⁶⁷ there are few regulatory takings cases in which the Court considers the subjective meaning of property to its owners, and the Court rarely—if at all—up- or downgrades its estimation of a regulatory burden on the basis of the property owner’s economic means or the significance of the property to the owner.²⁶⁸

IX. Limits on the *Sozialpflicht*

“Ownership might obligate, but not so far as to give it up,” states a prominent treatise on the *Grundgesetz*.²⁶⁹ Indeed, an Article 14 claim often focuses on locating the *Schranken-Schranke* (“limitation limit”), which refers to the limit on the legislature’s 14.1.2 discretion to determine the limits (*Schranken*) of property rights. “The common good is not only the justification, but also the limit for infringements on property rights,” according to the FCC.²⁷⁰ In other words, property rights may be limited in the name of the *Sozialpflicht* but only so far as is justifiable to further the public interest. The structure of Article 14 reflects the conceptual tension between the justification for and the

²⁶⁴ 481 U.S. 704 (1987).

²⁶⁵ Less than two percent of the total acreage of a tract or earning less than \$100 for the owner during the previous year.

²⁶⁶ Dagan, *supra* note 263 at 801. Dagan goes on to argue that the Court’s implicit consideration of the relative economic and political power of the injured property owners in that case (the Native American holders of the small interests) reflects the fact that Reservation Indians, who cannot vote in federal elections and do not have congressional representatives, are “excluded from the pluralistic give-and-take that requires representation in the political process” to such an extent that burdens on their ownership rights should be given special consideration

²⁶⁷ Dagan, *supra* note 263 at 801.

²⁶⁸ Even here, Dagan’s interpretation has not been widely adopted. Most scholars cite *Hodel v. Irving*, rather, for the proposition that the right to devise property to one’s heirs is one of the most essential sticks in the bundle of property rights.

²⁶⁹ Maunz, *supra* note 179 at RdNr. 489. (“Eigentum verpflichtet zwar, aber doch nicht dazu, es aufzugeben.”)

²⁷⁰ Maunz, *supra* note 179 at RdNr. 306; BVerfGE 79, 174 (198).

limitation on property regulation.²⁷¹ The same clause that empowers the legislature to define property as an exercise of the *Sozialbindung* limits this authority by unconstitutionally guaranteeing protection of certain core property rights, regardless of the justification for limiting them.

Finding the constitutional border for the content and limit-defining legislature—the absolute and essential core of the fundamental property right and the property guarantee (the *Kernbereich*)—therefore, involves two central inquiries: 1) what the *Bestand* or “condition”²⁷² of an owner’s property entitlements are and 2) what part of that protection may not be infringed by the *Sozialbindung*.²⁷³ In determining what a property owner may rely on as her protected “condition” of rights, courts look at how the owner has used the property until the point of regulation. Her rights are more likely to be considered positively guaranteed (and therefore off limits for legislating away) if her use of the property meets the fundamental purposes of property protection; if she has invested labor and/or capital in using her property and if her expectations for continued use are reasonable (i.e. socially responsible for the greater community). Thus, in circumscribing the essential core (the *Kernbereich*) of ownership rights, these three categories—(1) *Sicherungseigentum* (those objects required to maintain a subsistence level), (2) *Leistungseigentum* (property acquired by an owner as a result of his or her own efforts, including both monetary contribution and labor) and (3) *Vertrauenseigentum* (a legal position that a reasonable owner would rely upon)—enjoy the greatest protection. The FCC considers both subjective elements (the uses that must remain for the individual owner) and objective elements (the essential uses that must remain for a legal position to still “deserve”²⁷⁴ the name “property”) of the *Kernbereich*.²⁷⁵

²⁷¹ As one prominent commentator (and sitting judge on the Constitutional Court) observes, this presents a conceptual tension: “How can Article 14 protect property from the legislator when its content is, in the first place, determined by the legislator?” (quoted in Thomas von Danwitz, *supra* note 71 at 158-59, translation by author).

²⁷² This might also be translated as “stock” or “inventory.”

²⁷³ Pieroth, *supra* note 232 at Rdnr. 897.

²⁷⁴ BVerfGE 100, 226.

²⁷⁵ Felix Hammer, DIE GESCHICHTLICHE ENTWICKLUNG DES DENKMALRECHTS IN DEUTSCHLAND 39 (1995).

A. Vested property rights

The property guarantee does not cover mere expectation of future earnings or profit that an owner expects to acquire based on nothing more than an existing favorable situation (such as lack of pre-existing regulation or a general zoning designation of one's parcel before a building permit has been applied for).²⁷⁶ Only what has already been acquired or achieved through the investment of one's own work (*eigene Leistung*) or capital (considered the equivalent of *eigene Leistung*)—what has been “*ins Werk gesetzt*” (set in motion)—is constitutionally protected.²⁷⁷ Thus, because the property owner in the Bavarian Nature Protection Law described above had nothing “in the works,”²⁷⁸ he was not considered to have any vested rights or entitlement to build on his property at the point that regulation was imposed. Based on the general constitutional principle of *Vertrauensschutz* (protection of valuable expectations), Article 14 protects the owner who has created value on her land, in reasonable reliance on a certain legal situation, from the sudden devaluation of her property by a change in the law.²⁷⁹

The *Planungswertausgleich*, a planning tool for recouping from owners part of the increase in property values created by government-funded improvements in redevelopment districts (*Sanierungsgebieten*), illustrates the principle of vested rights in its most extreme version.²⁸⁰ The rationale for requiring a property owner to surrender some of her profits is that land-use regulation, rather than one's own efforts, are responsible for the increase in value of the property.²⁸¹ As one commentator explains, “If the law compensates an owner for the loss of a right, should he not be obliged to also compensate the public for benefits which have accrued to him directly and only from the enactment of a zoning ordinance... If the enactment of an ordinance raises the market

²⁷⁶ Peter Badura, STAATSRICHT 220 (2003); BGHZ 23, 235 (1957); BGHZ 55, 261 (1971).

²⁷⁷ In contrast, the FCC has found that a landowner's reliance on the existing legal situation is not as great (and, therefore, the discretion of public authorities to interfere with private property rights broader) in the case of improvements or services provided by the State (*staatliche Leistung*). See Maunz, *supra* 209 at 402.

²⁷⁸ A footbridge erected without the proper building permit was discounted by the Court.

²⁷⁹ BVerfGE 58, 300, 349.

²⁸⁰ This is codified in the Baugesetzbuch at Para. 154 ((1): “A financial settlement towards the financing of redevelopment to correspond to the increase in the land value of the property as a consequence of redevelopment is due in favor of the municipality from owners of property within a formally designated redevelopment area...”; (2): “The rise in the land value of a property contingent on the redevelopment consists in the difference between the land value which would apply in respect of the property if redevelopment had been neither proposed nor implemented (initial value), and the land value ensuing in respect of the property from the reorganization in law and in fact of the formerly designated redevelopment area (final value)”).

value 100 percent from one day to the next, then the ‘elimination of the planning profit’ could limit those benefits arising not from individual efforts, but from the public concept of city planning.”²⁸² Although there were proposals in the German parliament in the 1970s to enact legislation requiring such reimbursement in a broad range of circumstances, this planning measure remains limited to the specific case of redevelopment districts rather than to all zoning measures that might increase the value of an owner’s property. Nevertheless, the *Planungswertausgleich* illustrates the importance of an owner’s own investment in a property use for determining when that right has vested, as well as the more general willingness of the courts and legislature to temper profits that are not considered vested.

B. The Special Case of Development Rights (*Baufreiheit*)

Under German law, an owner is not necessarily entitled to any use, unless it has made concrete by the legislature performing its 14.1.2 function to formulate positive law and, therefore, protected by *Bestandschutz*.²⁸³ Nevertheless, the majority opinion among scholars is that *Baufreiheit* (“freedom to build” or, more accurately, freedom to build *within the law*²⁸⁴) is part of one’s inherent right to use one’s property.²⁸⁵ Practically speaking, this freedom is probably academic, though—the elimination of uses that have not been explicitly permitted by the government (in the form of a building permit) are not compensable²⁸⁶ and there are no inherent building uses so strongly suggested by the nature or situation of property that they can extend further than the positive protection legislated under 14.1.2, according to the FCC.²⁸⁷ (The notion of the *Kernbereich*, of

²⁸¹ Maunz, *supra* note 209 at Rdnr. 414.

²⁸² Dolzer, *supra* note 183 at 38.

²⁸³ BVerwGE 72, 362, 363; BVerwGE 106, 228, 233.

²⁸⁴ Pieroth, *supra* note 232 at Rdnr. 902.

²⁸⁵ Van der Walt, *supra* note 9 at 154; BVerfGE NvwZ-RR 1996, 483; Under the Federal Building Law, land is divided into three categories: 1) areas that have been designated as development land within a building plan (“im Geltungsbereich eines Bebauungsplans”), Para. 30; 2) areas that allow development without a plan on parcels surrounded by developed areas (“innerhalb der im Zusammenhang bebauten Ortsteile”), Para. 34; and 3) areas that are, in principle, not open for development (“im Aussenbereich”), Para. 35. Therefore, only holders of Para. 30 and Para. 34 land may be said to have *Baufreiheit*.

²⁸⁶ Maunz, *supra* note 209 at RdNr. 405

²⁸⁷ The Court held in the *Nassauksiekungsbeschluss* that there are “no ownership rights that, by the nature of the thing, supersede the normative content and limit determination of property, and can, regardless of each constitutive ascertainment of property, constitute protected legal positions.”

course, represents a constitutional entitlement to some *use* of property, though it may be one that does not involve building.)

Thus, *Baufreiheit* really only means that that the right of an owner to build must be weighed against the common good and does not prevent substantial regulation of development.²⁸⁸ The results of such a weighing of interests may even be that no building is allowed on a certain plot. In the chapel case mentioned above, for instance, preserving the landscape around an already-existing historic structure was accorded greater weight than the individual owner's *Baufreiheit*.²⁸⁹ Environmental protection also regularly supersedes the freedom to build.²⁹⁰

The question of development use is also unsettled under U.S. law, as suggested by the dialogue between the *Nollan* majority and Brennan's dissent in that case.²⁹¹ Although the *Nollan* plaintiffs purchased property after the passage of legislation requiring provision of public access in new development projects, the Supreme Court nevertheless held that conditioning the right to build on provision of this access would constitute a taking. Though Brennan referred to a development permit as a "benefit" in his *Nollan* opinion, the majority rejected this reasoning, holding that the "right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'government benefit.'"²⁹² Taken from the *Nollan* plaintiffs, under this conception, was the right to pursue economic value by building on their lot without providing public access. Although the property owners had never acquired the right to build without providing this public access under state law, the court clearly considered this their "property."²⁹³

C. *Kernbereich and Privatnützigkeit*

Distinct from the notion of vested rights is the *Kernbereich* ("core area"). Certain essential rights, analogous to the Anglo-Saxon conception of sticks in a bundle, are considered inviolable and protected regardless of pre-existing use or reliance—namely,

²⁸⁸ Maunz, *supra* note 209 at RdNr 408.

²⁸⁹ BBauBL 1958, s. 1385.

²⁹⁰ See, e.g., BVerwGE 94, 1.

²⁹¹ Peterson, *supra* note 54 at 66.

²⁹² 483 U.S. at 833-34.

dominion or disposition over property (*Verfügungsbefugnis*) and an owner's private use of the object (*Privatnützigkeit*). The theory behind the *Kernbereich* is that, at some point, regulation can become so burdensome on one or both of those rights that the core of property ownership is infringed, and the property guarantee compromised. At this point, a regulation becomes unconstitutional. Any inquiry into the proportionality or general constitutionality of a regulatory or legislative property-defining measure must, therefore, be guided by the essential question of what uses remain in the hands of the owner.²⁹⁴ In fact, defining or even recognizing the point at which *Kernbereich* uses have been eliminated is the central concern of contemporary constitutional property jurisprudence.

The loss of *Verfügungsbefugnis* has been relatively easy for courts to identify. Land-use regulation that depresses the value of property to such a great extent that it becomes impossible for owners to sell or transfer land in fee simple has been treated as equivalent to the loss of *Handlungsfreiheit*, the right to transfer property, and, therefore, considered an unconstitutional infringement of an owner's disposition over property.

Courts have had a more difficult time determining when *Privatnützigkeit* has been lost, however. In defining private use as "the assignment of a property object to a rights bearer, who will use it as the basis of private initiative," the FCC protects private autonomy in the economic sphere insofar as such autonomy is critical to realizing the purpose of property protection for the capitalist "social order" and for the individual owner.²⁹⁵ Thus, courts have identified two elements of *Privatnützigkeit*: 1) the abstract and inherent utility of an object (uses that are objectively reasonable and socially just, based on the property's natural situation and social function) and 2) the freedom of the particular property owner to choose among possible uses (the actual uses available to the owner based on the current legal order and her relationship to the object of protection). While the first element requires courts to gauge societal consensus, the second involves a subjective analysis of the purpose served by ownership for the individual and of what has

²⁹³ Peterson, *supra* note 54 at 66.

²⁹⁴ Maunz, *supra* note 209 at RdNr 375.

²⁹⁵ Maunz, *supra* note 209 at RdNr 335-336 ("Article 14 guarantees property as the legally recognized willpower of the individual, as a means of shaping the social order... The individual must self-responsibly, autonomously and through private use participate in the building up and shaping of the legal and social order.") (Translation by author.)

been described by one scholar as the “freedom potential,” or the financial basis left to the owner for self-governance and autonomy.²⁹⁶

In the Bavarian Nature Protection Law case described above the Court determined, after examining both prongs of private use, that the *Kernbereich* had not been infringed. In addition to the fact that the plot did not objectively suggest or seem suitable for recreational uses and that the property owner had not exercised such a use before or acquired the land for this purpose, the Court’s opinion emphasizes that he could still use the land for agriculture or forestry, apply for a variance, as well as sell or lease the parcel. The owner, in other words, still had private use of his property (*Privatnützigkeit*) because he could derive some utility from it, even if it was not a use particularly profitable to him.

However, even if a property owner must accept, as part of her non-compensable social obligation, that she will be denied the most profitable use of her property,²⁹⁷ owners may not be compelled to use property at a loss. Under the private use requirement, the owner must be able to realize some profit on her property.²⁹⁸ Thus, although courts have sanctioned regulations obligating owners to bear the cost for preservation or maintenance of historically or culturally significant property, it is generally considered unreasonable for owners of protected buildings to dip into personal savings (rather than the profits of property use) to fulfill the preservation obligation.²⁹⁹ In a recent case before the FCC, the Court found that an industrial concern denied the right to tear down a historic villa under an architectural preservation statute had been denied private use of its property. Despite maintenance costs of 300,000 DM per year as well as another 1,000,000 DM for legislatively mandated renovations, the villa had been empty since 1981 and the owner could find neither buyer nor lessee.” Since transfer of the villa had become impossible, the Court concluded that the company had lost the right of disposition. With no other reasonable private use for the property, the owner was forced to bear a burden “without being able to enjoy in exchange any of the advantages of private use.” That is, the social obligation to preserve and restore the structure had

²⁹⁶ Hammer, *supra* note 275 at 39 (quoting BVerfGE 79, 292 (304)).

²⁹⁷ Haass, *supra* note 207 at 1056.

²⁹⁸ BVerfGE 38, 348, 370; BVerfGE 71, 230, 250, 253; BVerfGE 79, 29, 44 (“Although the property owner does not have a light to every possibility of exploitation, there is a claim to a reasonable yield.”)

²⁹⁹ VGH Mannheim, BR 562 Nr. 220, NuR 2000, 335 (337)

become more expensive than its value to the owner, now in a “situation that does not deserve the name ‘property’ anymore,” held the Court.³⁰⁰

Thus, in summary, differentiating a non-compensable (*entschädigungsfrei*-) from a compensable (*ausgleichspflichtigen*) social obligation is based on the private use remaining despite regulation.³⁰¹ This distinction, as illustrated in the discussion above on ownership rights of tenants, is at least partially subjective. The Court examines the uses left to a particular property owner, in light of property’s personhood-developing purpose for that owner.³⁰² Whether economically reasonable uses remain to the owner is determined with regard to property’s social function and relevance to non-owners, as well as its situationally-bound limitations.³⁰³

In contrast, post-regulation uses remaining to the owner are not the central inquiry of U.S. takings jurisprudence. Instead, the Supreme Court seems to focus on the absolute impact of a land-use regulation—that is, on what was taken rather than what was left over.³⁰⁴ Furthermore, “the existence of economic injury is indispensable to demonstrating a regulatory taking,” as the Federal Circuit Court of Appeals recently held.³⁰⁵ Although the Court still struggles to find the threshold beyond which regulation is unreasonable, the *Lucas* decision—which presents an extreme version of regulatory burden, the total wipe-out—is illustrative of the Court’s approach to determining impact of regulation.

In *Lucas*, the plaintiff real estate developer brought a successful takings claim on the basis of his intention to build homes similar to those on adjacent seafront parcels. No law prohibited him from building on the land at the time of purchase, but two years later

³⁰⁰ “Given the statutory preservation obligation on top of that [referring to the demolition prohibition and the effective loss of any reasonable private use], the [property] right becomes a burden that the owner has to bear alone, in the public interest, without being able to enjoying the advantages of private use in exchange. The legal position of the concerned then approaches the situation where it no longer earns the name ‘property.’”

³⁰¹ Maunz, *supra* note 209 at RdNr. 408.

³⁰² Maunz, *supra* note 209 at RdNr 337 (“the determination of the functionally-appropriate use as an element or expression of private use is therefore not to be objectively elaborated, but rather requires a value-based decision that is dependent on the particular type of property”).

³⁰³ Maunz, *supra* note 209 at RdNr 410.

³⁰⁴ For an extreme version of this approach see the dissent of Stephen Williams, Circuit Judge on the D.C. Circuit Court of Appeals in *District Intown Properties Limited. v. District of Columbia*. 198 F.3d 874 (1999). “From the perspective of ensuring that the government not engage in wasteful behavior, however, the focus on the uses of the land that *remain* is misplaced: [W]hat is decisive is that which is taken, not that which is retained.’ Whether the landowner is left with a limited use of the land or none at all is hardly relevant to that issue. And as the regulating government delineates the scope of regulation, the opportunity for strategic behavior is obvious.” 198 F.3d 886 (citing Richard A. Epstein, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 281 (1985)).

the state legislature passed an act barring Lucas and similarly-situated owners from erecting any permanent habitable structures on their lots in order to, among other purposes, prevent erosion of the state's beach system.³⁰⁶ Although the Supreme Court viewed this as a 100 percent deprivation of economically viable use of the plaintiff's land,³⁰⁷ the argument may be made that *Lucas* did not sustain a total deprivation because a total deprivation would have meant that the owner was denied the rights to occupy, use, exclude and transfer his property. As Justice Blackmun points out in his dissent,³⁰⁸ the property owner could still "picnic, swim, camp in a tent, or live on the property in a movable trailer," as well as probably sell the property to neighbors, nearby residents or speculators.³⁰⁹ However, he had lost his investment-backed expectation to be able to build on each lot, the majority held. While the holding does not suggest that the owner is entitled to extract the maximum profit from her property,³¹⁰ the decision does illustrate the emphasis on the economic injury to plaintiff in regulatory takings cases.

D. What property is not: *Bestand* not *Wertgarantie*

In contrast to the U.S., German constitutional property doctrine has developed around the guarantee of a personal right. Neither every possible or economically reasonable use³¹¹ nor the chance to exploit every economically valuable use³¹² is

³⁰⁵ *Seiber v. U.S.*, 364 F.3d 1356 (2004) (citing *Hendler v. United States*, 175 F.3d 1374 (Fed.Cir. 1999); *Fla. Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed.Cir. 1994)).

³⁰⁶ Note, however, that the dissenting justices on the South Carolina Supreme Court disagreed with the majority's application of the noxious-use rule to this case because they found that the primary purpose of the legislation was not to prevent a nuisance, as the majority found (holding that the statute was "properly and validly designed to preserve . . . South Carolina's beaches"), but rather to promote tourism and create habitat for indigenous species, purposes which "could not fairly be compared to nuisance abatement." 304 S.C. 376, 379, 396.

³⁰⁷ Elaborating on the *Penn Central* test (in which the three factors that must be considered when measuring a regulatory taking are 1) the economic impact of the regulation on the claimant, 2) the extent to which the regulation has interfered with distinct investment-backed expectations and 3) the character of the government action), 438 U.S. 104, 124 (1978), *Agins* articulated an additional two-part test, under which government action that does 1) not substantially advance legitimate state interests or 2) denies an owner economically viable use of his land is usually considered a taking. *Agins v. City of Tiburon*, 447 U.S. 225, 260 (1980). Some commentators have interpreted the second part of this rule to mean that property rights guarantee investment-backed expectations as well as protection against deprivation of all commercial value (without inquiry into whether realization of that value is a reasonable expectation). See, e.g., Siegan, 145.

³⁰⁸ 505 U.S. at 1036. Stevens and Souter also contended in separate opinions that the finding of no value was incorrect.

³⁰⁹ The Act also allowed the construction of certain nonhabitable improvements, such as wooden walkways and decks. S.C.Code Ann. § 48-39-290(A)(1) and (2) (1987).

³¹⁰ In *Penn Central*, for example, the Supreme Court ruled that a plaintiff, denied the right by historic preservation legislation to significantly increase its profits by building a structure on top of the historic terminal, still had a viable economic use in the original structure and therefore had not suffered a taking.

³¹¹ BVerfGE 58, 300.

protected. In general, worth is guaranteed only to the extent that it is necessary to secure freedom and autonomy in an economic sphere.

In order to distinguish freedom- and autonomy-securing uses of property from the mere protection of economic worth, the German courts consider the subjective meaning of already-existing property rights (the “condition” or *Bestand*) for an owner. A recent FCC decision about the responsibility of a property owner to restore the contaminated soil on his plot to its natural condition, regardless of whether he caused the damage or even knew about it upon purchase, illustrates this analysis. In this case, the FCC re-examined the Court’s general guideline that a regulation is no longer proportionate if the owner’s costs in meeting her social obligation surpass the property’s market value (because this would represent the effective loss of the right to transfer). However, this is not an absolute rule, the Court held, because the value that may be recovered on the market is not always an accurate gauge of the owner’s relationship to the property. Fair market value does not necessarily reflect what the owner herself has actually invested in the property. Factors that cannot be attributed to the plaintiff, such as changes in planning law or in the worth of neighboring properties, may affect the overall value. Further, the owner may derive certain subjective benefits from the property that make it more valuable to her than to the market.³¹³ Courts should engage in this type of individualized analysis in determining the threshold of reasonable social obligation, the Court held, because if the property constitutes a significant portion of the owner’s net worth and “therefore serves as the foundation of her private life and that of her family,” the social obligation might be adjusted downwards.³¹⁴

The scheme of remedies available to property owners for takings or disproportionate limitations of property rights also reflects the priority of the *Bestandsgarantie* (guarantee of one’s existing “condition” of property rights) before the *Wertgarantie* (guarantee of the worth of property). As the FCC has said on a number of occasions, there is generally no inverse condemnation action for regulation. Property owners, in other words, may not “tolerate and liquidate” by demanding money for an excessive limitation of property rights that has been suffered if the statute under which

³¹² BVerfGE 38, 348 (371)

³¹³ BVerfGE 102, 1 (20)

the regulation was carried out does not provide for the equalization payments described above. The property owner may attack a regulatory action as an unconstitutional infringement of her property in the form of a facial challenge to a regulation or statute and obtain an injunctive remedy, but an unconstitutional definition of property by the legislature under 14.1.2 cannot be reinterpreted as an expropriation and cured by granting compensation, as it may be under U.S. law. Even if legislation provides for compensation to disproportionately burdened landowners, Court has also stated on multiple occasions that *Ausgleichsleistungen* (equalization measures) may not be limited to money and that non-monetary compensation is in fact preferable, insofar as it secures property in the hands of the owner.

X. Conclusion

Private property plays a similar role in Germany and the United States. In both countries, legal recognition and protection of property rights represent a surrogate or symbol for freedom, actual and potential. Thus, at the core of both schemes of constitutional property protection is a strong neoclassical conception of shielding the state's overreaching into one's personal sphere. However, alongside that in Germany, at both the doctrinal level and as an essential ingredient of constitutional culture, is a rigorous and widely accepted notion of social obligations of property use. In contrast, courts in the U.S. have long faced vigorous resistance from both property owners as well as their legal and political advocates to duties imposed on landowners by the State in furtherance of the public interest. Yet, despite the highly abstract and lofty rhetoric of German constitutional property decisions that proclaim a strong social obligation and little protection for excessive wealth, one might argue that the results of challenges to land-use regulation do not come out that differently in the two countries' courts and that popular understanding of property rights in the U.S. seem to underestimate the obligations that have become solid legal precedent.³¹⁵

³¹⁴ On the other hand, the property owner who has willingly taken on risk (in the sense that she caused damage or knew about it on purchase) might face a social obligation that is higher than the market value of the property. *Id.* at 21.

³¹⁵ And this has, indeed, been argued. See, e.g., John N. Drobak and Julie D. Strube, *The Constitutional Protection of Property Rights: Lessons from the United States and Germany*, transcript available from author.

However, a survey of regulatory takings decisions in the two countries demonstrates that there are several important differences between the two that, collectively, reflect a greater protection for economic value absent personhood interests in the U.S. First of all, in Germany there is broad consensus among courts that the purpose of property protection is both to preserve a market-based economy as well as to secure the autonomy and dignity of its participants, and that protecting the former is not a substitute or proxy for the latter. Second, the clear statement of the purpose of property protection found in all Article 14 decisions forms the basis for the concept of the *Kernbereich*, the core of rights that are absolutely protected by the constitution's positive property guarantee. Moreover, this *Kernbereich* is different for every owner. The court's analysis is individualized, not only insofar as the reasonableness and vestedness of uses are concerned, but also to the extent that the Court determines whether the owner's use of and relationship to her property match the purposes for which property is protected. Finally, anything that is not within this *Kernbereich* may be sacrificed to other owners for the good of society.³¹⁶ This means that the scope of the *Sozialpflicht* is measured by the *Kernbereich*, which is in turn tied to a purpose of property protection that is both personal and economic.

In the U.S., on the other hand, scholars and courts alike have been unable to settle on a core of property rights or a threshold beyond which exercises of the police power are unreasonable, and perhaps related is the fact that there is almost no judicial mention of the purpose of property protection in U.S. law. Although it is never referred to by judges as such, there does seem to be a positive guarantee in U.S. law—one that is predominantly a guarantee of economic value, though certain statutes³¹⁷ and public use jurisprudence (both outside the scope of this paper) suggest that legislatures and courts at least recognize personhood interests even if they are not explicitly considered in *Penn Central's* regulatory takings analysis. Tying the reasonableness threshold to fair market value has proved difficult for courts to administer,³¹⁸ and has left lower courts confused as to what the property clause guarantees and what it prohibits.

³¹⁶ So long as such restriction is not unduly burdensome, as it was in the Obligatory Sample case.

³¹⁷ Such as the owner occupant exception for many just-cause eviction ordinances

³¹⁸ Courts have struggled to determine the appropriate geographic and temporal denominator in regulatory takings as well as the numerator that is significant enough to constitute a taking

Moreover, one important difference thus far unaddressed may be that many of the regulations challenged in the U.S. (such as the coastal protection measure in *Lucas* or the development moratorium in *Tahoe*) go challenged in German courts, accepted as routine planning measures under the complex regulatory structure codified in the *Baugesetzbuch*. The backdrop of the strong social state in Germany and public acceptance of general community interconnectedness and obligation might, therefore, explain many of the differences described here and perhaps limit the political viability of these doctrines in U.S. courts.